

**STUDIES IN THE COMPOSITION  
OF  
ḤADĪTH LITERATURE**

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## ABSTRACT

This work is concerned with the form and content of the ḥadīth texts reported and preserved during the Classical Period (c. 175 - 300 A.H./792 - 912 A.D.\*) and traditionally associated with the Stoning Penalty (SP) for adultery in Islām. Its main aim is to analyze the texts and to determine the course of their composition.

The thesis is divided into two sections. Section One deals with the analyses of seven Prophetical ḥadīths preserved in three Sunnī "Canons"; the Muwatta' of Mālik (d.179), the Ṣaḥīḥ of Bukhārī (d.256), and the Jāmi' of Tirmidhī (d.279).

Section Two examines the reasons for, and nature of the juridical disputes (Ikhtilāf al-fuqahā') of the Pre-Classical Period scholars (c. 100 - c. 200 A.H./718 - 815 AD\*) with respect to the laws of adultery. Each section comprises seven chapters and an introduction.

The conclusion reached in Section One is that the material examined reveals more about the concerns of those who transmitted and preserved the ḥadīths in question than it does - as is traditionally claimed - about the early community of Muḥammad in Medina.

The conclusion of Section Two is that the Ikhtilāf provoked the composition of ḥadīth material dealing with the SP in Islām. This calls into question the established view that the disagreement of law specialists (fuqahā') is the result of varying individual understanding or interpretation of a particular textual prop (naṣṣ pl. nuṣūṣ), and at the same time demonstrates that, in most instances, the Ikhtilāf is itself prior to the text under discussion.

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\* See below, Introduction, P.4

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# آفات الأخبار ورواتها

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Jald plus Banishment

Jald plus Stoning to Death

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## INTRODUCTION

Islamic 'Oral' <sup>1</sup> Tradition, the Ḥadīth or the Sunna, <sup>2</sup> is an enormous corpus of literature covering virtually everything essential for a Muslim to conduct his life in relation to both his fellow human beings and God. Its contents form the main base of Islamic teachings. Because of its voluminous nature, it practically occupies a more influential position in the formation and articulation of Islamic jurisprudence than does the Scripture - the Qur'an <sup>3</sup>. Its most significant feature is its virtual dependence upon the sayings, actions and deeds of one man - the Prophet. <sup>4</sup>

Muslim scholars maintain that the content of the ḥadīth literature originated from the Prophet Muḥammad himself; since, the argument goes on, it was handed down by pious trust-worthy Muslims, generation after generation, through a chain of transmitters - known as the isnād. Thus, as far as the Muslim scholars are concerned, the authenticity of the content of the ḥadīth material lies in the trust-worthiness of the reporters i.e. the persons named in the isnād.<sup>5</sup> Several criteria for authenticating the ḥadīth content have been set forth. all of which, strictly speaking, are subsidiary to the scrutiny of the isnād.<sup>6</sup> In short, the scrutiny of the isnād is exclusively the yardstick for assessing the credibility of the ḥadīth content.<sup>7</sup>

In recent years this traditional attitude has been rejected - mainly by Western scholarship <sup>8</sup> - on the ground that as much as it is easy to produce a false statement and ascribe it to a person who is no longer in a position to confirm or deny the ascription, it is also easy, or even much easier, to invent a chain of transmitters, or to insert a name in it and thus, to extend it back -without a break - to the Prophet. <sup>9</sup>

Furthermore, the stipulations and demands for the notarization - tawthīq - of the reliability of an individual transmitter(s) are first and foremost not only based on, and derived from, a personal judgement, but also have never been agreed upon.<sup>10</sup> There is no single transmitter whose trust-worthiness is a subject of absolute agreement.<sup>11</sup> In many instances, statements of tawthīq or its opposite: tajrīh - invalidation, defamation of one's character, are more likely to appear as pseudo-biographical dicta or as tendentious prejudices than as an adequately objective first-hand information.<sup>12</sup> Thus, it has been argued that the acceptance or rejection of hadīth material should be based primarily upon the examination of the text itself - the matn.<sup>13</sup>

Of the most recent contributions to that end is the work of J. Schacht, The Origins of Muhammadan Jurisprudence, which in general is the confirmation and at the same time an extension of the general, but cautious, conclusion of Goldziher's main thesis.<sup>14</sup> Schacht's general conclusion, however, is not adequately supported.<sup>15</sup>

With regard to the wholly available pertinent hadīth material, arbitrary selection of limited Traditions, which can hardly be demonstrated to have anything in common, other than being 'legal', cannot in my opinion, support a superfluous conclusion to include every single Tradition of the same topic and theme, which ought to have been included, let alone every single Tradition of a legal nature.<sup>16</sup> With such undertaking, the conclusion ought to be confined only to those individual Traditions which form the basis of discussion of such work.<sup>17</sup>

In other words, although Schacht's method is scientific and sound, his general conclusion for the whole corpus of legal nature is

unacceptable.<sup>18</sup> The only time when such an over-simplified conclusion could have much validity is when such a method has been applied thoroughly to at least half of the whole corpus of legal materials. To do so, for a single scholar is almost impossible. An alternative would be to deal with one type of ḥadīth material, traditionally assigned not only to one topic and theme, but also engaged in identical problems. Admittedly, even a conclusion reached upon such principles will not provide the kind of generality which Schacht had made, but nevertheless, a group of Traditions, which are topically exclusive can, at least, be put to a firm test.

This thesis is intended to serve as an experiment to that end and at the same time as a stepping stone for future studies in the ḥadīth literature. Its topic is the punishment for adultery/fornication; its theme is the legality of the Stoning Penalty - SP - known as rajm, as opposed to, or including the flogging penalty, known as jald in Islām.<sup>19</sup>

My reason for analyzing the ḥadīth material dealing with this topic and theme is that the laws of SP for adultery are incontrovertibly known to be distinctively Islamic.<sup>20</sup>

Secondly, Muslim scholars, not to mention ordinary believers, claim that these laws were established by the Prophet himself, by applying them on the one hand and proclaiming their effectiveness (validity) on the other. In other words, these laws are 'ordinances', directly derived from, and based upon, the actions and sayings of the Prophet. Thus, if there are any laws apt to fit diametrically opposing theories, that is, the theory of the traditionists and that of the ḥadīth critics, the laws of adultery are the most suitable candidate. These laws are, to begin with, manifestly Islamic, that is, reflective of the distinctive conviction of 'Orthodox' Islām.<sup>21</sup>

My argument is that we can fairly and squarely put to test both the traditional claim concerning the Prophetical ḥadīth and the opposite theory of the ḥadīth critics, on the one hand, by examining laws upon which we can all agree at the outset that the ḥadīth, to begin with, should provide abundant material and, on the other hand, by concentrating on that material which is not only of the common category, that is, legal, but also of the same topic, theme and problems. In other words, I will examine closely the material of ḥadīth literature dealing with the SP and the role and function of that literature within the elaborate works of fiqh - jurisprudence.

In order to be able to understand and appreciate the fiqh sources, both in their diversity and concord on the one hand, and their relation to the ḥadīth literature on the other, I propose the following terminology:

- a) Pre-Formative Period Pr. FP.
- b) Formative Period FP.
- c) Classical Period CP.
- d) Post-Classical Period Po.CP.

The classification extends from the beginning of the Literary Period onwards.<sup>22</sup> That is to say, the first period is from about the beginning of the second century A.H. to the death of Shaybānī d. 189, i.e., from c.100 to c.190.

The Formative period is meant to correspond with the legal system put forward by Shāfi'ī (d.205) to the emergence of the Ahl al-Ḥadīth proper, i.e. the Traditionists, Bukhārī (d.256), Muslim (d.261), Ibn Māja (d.273), Abū Dāwūd (d.275), Tirmidhī (d.279) and Nasā'ī (d.303), who came to be known as the authors of the Six Canons (Ummahāt al-Sitt).

In other words, FP, is from c.190 to c.225. It is the shortest period, covering about 30 or 40 years only. It is a period in which, thanks to Shāfi'ī, Islamic Jurisprudence was put under a comprehensive legal system - Uṣūl al-Fiqh.<sup>23</sup> I have extended the period to about 225 A.H. to allow room for the general acceptance of Shāfi'ī's theory, for his arguments were not accepted generally until well after his death. Similarly, I have extended the CP. retrospectively to allow the long activity of collecting, sifting and editing the ḥadīth material of Bukhārī and at the same time to include Aḥmad b. Ḥanbal (d.242), the teacher of many classical authors, as the pioneer of that period.<sup>24</sup> The death of Nāsā'ī stands at the end of the Classical Period and the beginning of the Post-Classical Period. This is a period during which every legal and other problem was referred to a ḥadīth belonging to the Classical Period. Thus, it extends from the beginning of the fourth century onwards.<sup>25</sup> The period prior to Pr. FP, or to the Literary Period in general, could be described as the IDEAL period. It is a period whose life style, actions and deeds as well as decisions were seen by later generations as the ideal examples to be followed.<sup>26</sup> A more explicit picture will then emerge as follows:

Ideal Period	.... to 100 A.H.
Pr.FP	c.100 to 190 A.H.
FP	c.190 to 225 A.H.
CP.	c.225 to 300 A.H.
Po. CP.	c.300 onwards

The work is divided into two sections. Section One is concerned with the analysis of the ḥadīth material and Section Two deals with the Ikhtilāf <sup>27</sup> al-Fuqahā' - juridical dispute - concerning the punishment of adultery. However, before explaining the method about to be embarked upon, it is necessary to make a few points.



First, I neither assume, nor intend to give the impression of, being concerned with the authenticity of this or that Tradition. Important as it may be, I believe such a question is secondary to the function of the text under discussion. That is so, because it is not easy, even if it were possible, to say what had or had not actually happened. None of us, nor indeed even those who carefully preserved for us the ḥadīth material, was present at the era of the alleged event being reported. Hence, giving oneself the task, from the beginning, of proving or disproving the credibility of any report is, in my opinion, to seek the impossible. One should try to understand why, where, when and even how such and such a report was told, preserved and employed. At the end, if the question of credibility or otherwise for a particular text appears warranted, then it is not because one was primarily concerned with that issue, but rather it is because such a conclusion appears to have revealed itself.

Secondly, by asking historical questions which are inevitably by virtue of the forms and structures of the individual ḥadīths to be analyzed, chronological consideration of the ḥadīth collections is vital. However, to include all Classical works would result in an enormous thesis. Hence, concentration on a carefully selected number of the Classical works is necessary. This, I believe, will give us a fair picture of the literature we are concerned with.

I propose to analyze the materials of Bukhārī<sup>28</sup> and Tirmidhī<sup>29</sup> for the Classical Period and that of Mālik<sup>30</sup> (d.179/795) who belongs to Pr.FP. The reason is that, the Muwattaʿ of Mālik is the earliest work which has come down to us and which contains a considerable corpus of the ḥadīth literature. In other words, its historically initial position can serve as the basis of a greater understanding of similar ḥadīths to

be found in the Classical Period. Bukhārī's work occupies an unmatched position in Sunni circles. It is second to none but the Qur'ān <sup>31</sup>. The Jāmi' al-Tirmidhī, apart from being one of the Six Canons, <sup>32</sup> contains two important phenomena. First, systematic criticism of the ḥadīth text rather than attention entirely to the transmitters. To put it exactly, although Tirmidhī was following the traditional attitude concerning the criteria of authenticating the ḥadīth materials he nevertheless developed textual criteria too to be taken into consideration. <sup>33</sup> Secondly, his work provides a unique opportunity for the ikhtilāf al fuqahā'. <sup>34</sup> Assessments of different Muslim scholars are usually offered at the end of each ḥadīth. In short, as much as Mālik stands outside and prior to the Classical Period, Tirmidhī stands inside, but towards the end of that period, while Bukhārī stands well inside, but at its beginning.

Thirdly, in dealing with the ḥadīth material, no chronological order has been assumed or envisaged. The order of the ḥadīths is based on the arrangement of Mālik's materials according to Yaḥya's vulgate (d.234). <sup>35</sup> However, at the end of each chapter a reasonable possible inter-influence may be suggested.

Finally, for the reasons stated earlier, unless there is a strong argument to do otherwise, little attention will be paid to the isnād. My main concern will be centered upon the text of the ḥadīth - the matn.

### Procedure

For the analysis of each ḥadīth, four stages will be followed: Fragmentation, Identification, Analysis and finally Assessment.

Fragmentation is meant to indicate the breaking up of the pericope, that is the juridical hadīth, into its minimal juridical elements. These elements will be identified as -a-, -b-, -c-, etc. Each element might be fragmented further into components, such as -1-, -2-, -3-, etc. This practice will help us both to follow systematically the overall structure of the pericope in question and at the same time to identify any discrepancies, inconsistencies and contradictions in later stages. Identification is meant to indicate the category of the pericope, that is, historical, (i.e. factual event) juridical, (i.e. legislative) dogmatic or accidental, that is of no legal value etc. In other words, identification deals with the type and function of the pericope in general by taking into consideration various questions according to the character and structure of the text. This will be followed by the actual analysis of the pericope. In the beginning the primary questions are form-critical and historical. The chief interest is the inter-relationship of elements on the one hand and elements and their components on the other and at the same time the possible implication underlying them. Later, questions of literary analysis become important too. Finally, a tentative assessment will be offered and if possible the history of the pericope may also be determined. <sup>36</sup>

A similar procedure will be observed during the remaining two stages with respect to Bukhārī and Tirmidhī. In getting to these stages, previous questions will be dealt with in greater detail. For instance, while one may be flexible/lenient towards insignificant alterations, omissions or additions which are probably the result of "transmission and narration", <sup>37</sup> one cannot possibly allow discrepancies, inconsistencies and contradictions to pass unnoticed. Surely, two contradicting accounts of the same event cannot possibly both be right, and probably neither provides the kind of factual information historians

and hadīth critics need, but do not have, for the alleged period or even for the event itself. Similarly, an "incomplete" versus "complete" version/s simply united by not dissimilar details, cannot possibly both be taken to refer to the same story or event without a properly acceptable explanation for the "omission" or "addition", and probably neither is concerned with what has come to be considered as the "same event or story". At the end of each chapter, a synoptic view based on chronological compilation, including all major works of the hadīth literature from the PR.FP to Po.Cp., but covering primarily major issues, will be provided.

Section Two, then, is complementary to Section One. Here we will investigate the juridical attitudes of the Pr.FP., FP., and CP. scholars towards those issues of the hadīth material analyzed in Section One <sup>38</sup>. The chief questions are: What did they say or decide on such and such an issue? How did they present their arguments? On what point/s did they agree or disagree? How and Why? Where were they? Above all, what is the relationship of their juridical attitudes and the hadīth materials under discussion? In short, to what extent did the hadīth material influence their juridical attitudes or vice versa? Complementary to this are those opinions of the P.CP. scholars together with their arguments and the hadīth material which they now possess. <sup>39</sup> If we manage to do so, I presume we will have gone far enough to be able to give a fair and general conclusion concerning the hadīth material dealing with the punishment for adultery/fornication in Islām.

It remains to pay homage to J. Neusner for the method and technique employed here, which he had systematically employed in his Studies of Rabbinic Judaism <sup>40</sup> and to whose works, at my request, I was introduced by my supervisor, Doctor John Wansbrough. To both I am gratefully indebted.

# **Studies in the Composition of Ḥadīth Literature**

## **Section One**

### **TEXTS**

## CHAPTER I

### (A) THE STORY OF THE JEWISH COUPLE

#### Introduction

Although there is a considerable corpus of ḥadīth material which would be adduced as relevant, in one way or another, to the punishment of zinā, there are only seven ḥadīths widely recognised as loci classici for this crime in Islām. The ḥadīths themselves, in their myriad versions, required both time and space to emerge and to gain general acceptance, and to be finally assigned to a particular issue or point within the juridical discussions. Similarly, depending on the availability of the material, individual traditionists and jurists alike collected what they preferred, and even developed what they had, in conformity with their view points. The result was a frequent shift of emphasis as to the importance of a particular ḥadīth or its versions, as much as to the juridical implications which could possibly be adduced from a given version.

Our first author, Mālik, opens his section of ḥudūd (prescribed penalties) with the ḥadīth of the Jewish couple. The background of this ḥadīth, as given in the Sīra/Maghāzī literature, is that on Muḥammad's arrival at Medina the leaders of the Jewish community there spared no effort to antagonise Muḥammad on his claim to the prophethood. They engaged themselves in a number of issues with him. Among these was the question of the punishment for zinā.

It happened that a Jewish couple was taken in adultery. The rabbis meet and decide to go to Muḥammad, ostensibly to appoint him as the

arbitrator, but in fact, to see whether he knows God's law on this crime or not. The plot is that if he decides to have the couple stoned to death then he is a true prophet of God and the Jews should be on guard lest he usurp their position. But if he decides on anything other than the Stoning Penalty he is a false prophet, a mere king who might be recognised as such. Muḥammad asks them what the Torah says on such a crime. They tell him: "Public humiliation". They are challenged to bring the Torah for consultation. They do so, but one of them put his hand on the relevant passage and proceeds to read what was before and after. He is challenged to remove his hand. He does so, whereby the Stoning Verse appears. The Jews concede that there is a Stoning Verse in the Torah. Muḥammad gives his orders to have the couple stoned to death.

The ḥadīth came to be known as the ḥadīth of the Jewish couple. It is for this reason I have decided to call it: the Story of the Jewish Couple.

- a- A case of a Jewish couple who had committed adultery was brought before Muḥammad.
- b- Muḥammad asked the Jews: "What is the Torah's injunction on such cases?"
- c- The Jews replied: "Public humiliation and flogging."  
(nukhzihim wa nujliduhum.)
- d- Ibn Salām <sup>1</sup> a Jewish convert to Islam intervened and said:  
"Liars! There is a Stoning Verse!"
- e- The Jews brought the Torah, but one of them put his hand over the Stoning Verse and proceeded to read what was before and after it. (fa qara'a mā qablaha wa mā ba'daha.)
- f- Ibn Salām said to him: "Remove your hand!" So the relevant verse appeared.
- g- The Jews conceded to Muḥammad saying: "It is true, there is a Stoning Verse."
- h- Muḥammad ordered the Jewish couple to be stoned. (fa amara bihimā fa rujimā.)
- i- I saw the man leaning over the woman protecting her from the stones.

Mālik: Ḥudūd

C.1.H.1.



## COMMENT

The story is a mixture of a number of not unrelated issues. It is historical in form and refers to a particular incident. Its theme is doctrinal involving prophetic credentials,<sup>2</sup> while its content is juridical illustrating the legality of the SP [sic] for adultery.<sup>3</sup> Nevertheless, it is for the last point only that Mālik employed the story, as can be seen from his rubric: Bāb mā jā'a fī al-rajm (a chapter concerning that which has come down to us with reference to the Stoning Penalty). Had it not been for -e- and -f-, as we shall see later, the story would have flowed easily: each element would have depended perfectly on the previous one throughout.

Element -a- is a brief introduction as to how the whole issue came about and how Muḥammad came to be involved with the case in the first place.<sup>4</sup> Element -b- gives the impression of the nature of the question put forward by Muḥammad. On first sight, one has the impression that the question was an ordinary interrogative one. He simply wanted to know what the Torah said in such a case. But it is also possible that Muḥammad used such a tone to force proof on the testers of his prophetic credentials. The context of the pericope, moreover, would favour the latter. Whichever the case, -c- provides an answer whose truthfulness is challenged by an ex-Judaic believer, Ibn Salām (element -d-). His knowledge of the Jewish Scripture made him refute the treachery, by reminding them that there is a Stoning Verse in the Torah.<sup>5</sup> In other words, element -d- could serve perfectly well as a link between either of the two possible impressions of -b- and the content of -c-. One could understand Ibn Salām's intervention as a means of saving Muḥammad from being deceived or as a means of supporting his prophetic knowledge of God's injunction in the Torah. Thus -a-, -b-, -

c- and -d- provide an uninterrupted sequence of the developments. However, this order is abruptly disturbed by -e- and -f- which, were it not for them, -g- and -h- would have followed smoothly and logically. It would have simply meant that the false reply given in -c- for whatever the type of question in -b-, which was challenged in -d-, led to the submission of the truth expressed in -g- and, hence, the result of -h- was inevitable. Unfortunately, that is not the case.

As the story stands, -e- appears to be a counter-challenge to -d-. Ibn Salām's knowledge of the Jewish Scripture, as well as his intelligence, had been both undermined and nullified. Either he could not read, in which case -f- would be redundant, or he was part of the collective treachery, in which case -d-, or part of it - "Liars! There is a Stoning Verse!" - would hardly be necessary. The alternative would be to assume the stupidity of his ex-cobelievers for underestimating his allegiance to Islām.

If the sequence, then, comprises all elements but -d-, then there is a link missing at this point. On the other hand, if -d- is the actual link at this point, then both -e- and -f- are peculiar within the structure of the pericope. The unnamed rabbi who has treacherously held his hand over the relevant passage in the Torah was, as much as Ibn Salām would be [sic], part of a collective consent of the Jews to conceal the true punishment in the Torah so that Muḥammad's prophethood could be examined. With or without the help of Ibn Salām, Muḥammad stoned the Jewish couple in accordance with the Stoning Verse. Such was Muḥammad's decision concerning the punishment for adultery. He applied God's ruling - the true judgement.<sup>7</sup> Muḥammad had demonstrated that he is a true Prophet of God, he had recognised God's judgement in the Torah.

It is difficult at this stage to say more about the integrity of the pericope. Suffice it to say, however, that its construction is cumbersome. This in itself will possibly suggest that its structure is due to more than one person, or, to say the least, that it has been freely reconstructed out of a possibly massive haggadic material whose primary function was to demonstrate Muḥammad's prophetic credentials. Mālik's employment of the pericope for the legality of the SP in Islām [sic] is undoubtedly a secondary stage when juridical interests for the same pericope predominated over biographical motives.<sup>8</sup> This would suggest that the middle of the first half of the second century A.H. is most probably the earliest date which could be assigned to the pericope, while its employment in juridical matters could not extend beyond the middle of the second century A.H. Similarly, element -i- exhibits a purely juridical tendency<sup>9</sup> and hence it is probably a later augmentation. It possibly belongs to either Mālik himself or to his immediate transmitter - Yaḥyā (d.142).<sup>10</sup> In short, the pericope is a composite. Its components have been awkwardly combined to form a unit.

BU.A.I. On the authority of Ibn <sup>c</sup>Umar:-

- a- A Jewish couple - both had committed a crime (aḥdathā jami<sup>c</sup>an) -was brought before Muḥammad.
- b- Muḥammad asked them: "What do you find in your Scripture?"
- c- The Jews replied: "Our rabbis have invented (aḥdathū) the punishment of pouring hot water on the face and public humiliation (tajbiya)."
- d- Ibn Salām advised the Prophet saying: "Ask them to bring the Torah!"
- e- Same.
- f- Same, but add: "... and the Stoning Verse appeared under his hand."

- g- No corresponding element.
- h- Same.
- i- Ibn <sup>c</sup>Umar said: "The couple was stoned to death on the pavement (balāṭ) and I saw the Jew protecting the Jewess from the stones."

Bu. Hudūd:

C.9.H.1.

#### COMMENT

The setting is a little different in detail but not so much in the structure. Muḥammad's involvement with the case, the test of his prophethood and the inevitable result are the same both in order and in form. However, there are many more details in Bu.A.1. than in Ma.A.1. Yet, the pericope could still be put in the same category.

Element -a- clarifies that the accused couple were brought before Muḥammad in person, and the zinā term has been expressed obliquely - aḥdathā jamī<sup>c</sup>an. The same verbal form of ḥ-d-th has been used for the innovation of the new punishment authorized collectively by the "faithless" custodians of the Torah (element -c-). Muḥammad's inquiry has been improved. The ambiguity of the previous version concerning the nature of the question has been refined to demonstrate nothing but a challenge to the true punishment of the Torah, which is known to both parties. The public humiliation, expressed as nukhẓihim in Ma.1 has now been comprehended in the term of tajbiya. Nevertheless, flogging has not been mentioned. The acknowledgement for changing the Mosaic Law by rabbis has endorsed the existence of a different punishment. Hence it

anticipates element -e-, but at the same time makes -d- redundant or hardly necessary. Ibn Salām's advice to the Prophet to ask the Jews to bring the Torah for consultation (element -d-) exhibits the source of that law and, at the same time, supports the notion of forcing proof on the Jews. However, this does not make -e- and -f- flow easily unless we are to assume that Ibn Salam's collaboration in the treachery was, at least temporarily, expected. How wrong the Jews were can be seen from Ibn Salām's behaviour in -f-. Not unexpectedly, acknowledgement of the Jews concerning which law was valid has been eliminated by the omission of -g-. Nevertheless, Muḥammad stoned the Jewish couple in accordance with the Stoning Verse. The source of that verse is the Torah.

Now, the root ḥ-d-th has never been used, neither explicitly nor implicitly (ṣarīḥan or kināya) to denote: zinā. I know of no passage, apart from this one, where the root ḥ-d-th or its derivatives is used for zinā. Most of the early dictionaries, such as the Qāmus, Lisān al-<sup>c</sup> Arab and Tāj al-<sup>c</sup> Arūs,<sup>11</sup> give a very short and abrupt explanation for the root ḥ-d-th to denote zinā. While one can expect that the origin of this explanation could be the ḥadīth in question or the like of it, none of the sources mentioned above included it or cited any text to support that meaning.

Dealing with other glosses of the root ḥ-d-th, Ibn Manẓūr adduces two ḥadīths. One of Banū Quraiza,<sup>12</sup> in which it was claimed that Muḥammad did not kill their women except one who had aḥdathat ḥādithan, glossed as: "poisoning the Prophet."<sup>13</sup> The other is a ḥadīth about the sanctity of Medina as a Holy City, in which Muḥammad is claimed to have said:

.... man aḥdatha fīha ḥadathan fa<sup>c</sup>alayhi la<sup>c</sup>natu Allāh wa  
al-malā'ikat wa al-nās ajma<sup>c</sup>in. <sup>14</sup>

Ibn Manẓūr provides the following gloss: "al-ḥadath is an abominable action which is not customary or known in the Sunna." <sup>15</sup>

In a very long and tiresome list of the meanings for the root h-d-th and its derivatives, early dictionaries give the impression that the term is employed in connection with uncommon actions, innovation; it is sometimes designated in theological terms as "bid<sup>c</sup>a". The only verbal compound used to denote unlawful sexual relationship between two partners is a term or a phrase from the root f-h-sh or a-t-y plus direct object. Thus, fāḥisha, or fuḥsh etc., is sometimes implicitly used to denote sexual misconduct. Similarly, an expression such as X atā Z in such and such a manner, could be taken to mean a physical sexual relationship. Ibn Ḥajar, the commentator of Bukhārī who found himself face to face with this awkward construction, interpreted it as: "ay fa<sup>c</sup>alā amran fāḥishan" for "aḥdathā jamī<sup>c</sup>an" in element -a-, but for "...aḥdathū...." he interpreted it as "ay ibtakarū" in element -c-. <sup>16</sup>

Thus the combination of "aḥdatha" with "fāḥisha" in element -a-, makes it possible to gloss the aḥdathā as "to commit adultery", while the retention of .... aḥdathū alone in -c-, allows no interpretation other than "to invent." The existence of these variations, whose implications are important only to the jurists, could be taken as a significant clue that whoever was responsible for reconstructing the story was not a jurist proper, and that the prime motive of the pericope was the establishment of prophetic credentials. Nevertheless, in spite of these refinements, some of which are not insignificant, the structural integrity of the pericope is greatly improved. But it is difficult at this stage to say whether Mālik's version is the basis of this pericope,

or not.<sup>17</sup> None the less, suffice it to say that whatever the basis of Bukhārī's improvements, Mālik's version must have played a key role, whether directly or indirectly. We will have an opportunity to assess the developments in the synoptic section. One point remains to be made here. Bukhārī employs the pericope to demonstrate the appropriate place to carry out the punishment. This is adduced from Ibn 'Umar's remark that the couple was stoned to death on the pavement.<sup>18</sup> Thus, while the overall structure of the pericope shows its dependence on other version/s, the expansion of element -i- is tendentious belonging to the controversy known as: Iqāmat al-ḥudūd fī al-masājid which we may identify as the location of the SP.<sup>19</sup> In Mālik, the same element was produced in the face of a different juridical problem - namely: raḥt al-mahdūd, which we may identify as: the mode of SP. In short, Mālik's version is earlier than Bu.A.ī. Judging from the isnād, its present composition cannot go back beyond the time of Bukhārī or his immediate transmitter,<sup>20</sup> when "trivial" juridical matters, such as the location of carrying out the SP, took precedence over the more serious juridical concerns, such as the legality and hence the origin of the SP in Islām.

Bu. A.II On the authority of Ibn 'Umar:

The whole of Mālik's version, almost verbatim. The isnād is identical from Mālik downwards to Ibn 'Umar. The only changes we do encounter here are:

MĀLIK BUKHARI

- |    |                                  |                                      |
|----|----------------------------------|--------------------------------------|
| a- | ... <u>fa akhbarūhu anna</u> ... | ... <u>dhakarū lahu anna rajulan</u> |
|    |                                  | ...                                  |
|    | (informed him that ...)          | (said to him that ....)              |
| b- | ... <u>naḥḍakuhuma</u>           | ... <u>naḥḍakuhum</u>                |
|    | <u>wa yujladān</u>               | <u>wa jujlādūn</u>                   |
|    | (i.e. dual)                      | (plural)                             |

- |    |  |   |
|----|--|---|
| d- | ... <u>fa qāla lahum 'Abd Allāh</u><br>(So 'Abd Allāh said to them)                  | .... <u>qāla lahum 'Abd Allāh</u><br>(Abd Allāh said to them ...) |
| e- | ... <u>fa ja'ala aḥaduhum yadahu</u> ...<br>(put/place his hand over ...)            | ... <u>fa wada'a aḥaduhum yadahu</u> ...<br>(almost the same)     |
| f- | ... <u>thumma qara'a</u> ...<br>(and then read ...)                                  | ... <u>fa qara'a</u> ...<br>(and read ...)                        |
| g- | ... <u>fa qālū ṣadaqta yā Muḥammad</u><br>(So they said, O, Muḥammad, you are right) | .... <u>qālū ṣadaqa yā Muḥammad</u><br>(o, Muḥammad, he is right) |
| i- | ... <u>yaḥna'u 'alā al-mar'at</u> .....<br>(leaning over the woman ....)             | ... <u>yaḥnī 'alā al-mar'at</u> ...<br>(almost the same)          |
- Bu.Ḥudūd. C23.H.2.

Whether all these changes are significant or not is not really as important as the function of the pericope for Bukhārī. According to his rubric, the pericope has been adduced for the iḥṣān of dhimmīs:<sup>21</sup> a criterion upon which the protected non-Muslim minority can be subjected to the Islamic law of adultery. Again, this is one of the main points of the ikhtilāf among the early fuqahā'.<sup>22</sup> The issue at stake is not so much the dhimmīs' jurisdiction as the origin and source of the SP, which in turn involves the legality of the SP. All of these issues will be dealt with in the Ikhtilāf section. For the moment, it will suffice to say that Bukhārī is of the opinion that religious affiliation is irrelevant for the application of the SP, i.e. it has no role for the susceptibility to the SP, which is an Islamic rule.<sup>23</sup> The deduction of that attitude



from this specific version, originally transmitted by Mālik and adduced elsewhere for contrary views, is indeed significant. It shows how an identical pericope can be manipulated to interpret contradicting views.<sup>24</sup> But it must be noted that while the controversy is focused on the question of iḥṣān ahl-dhimma ( a question which incidentally has no support from either pericope), the discussion of the iḥṣān in general, as the distinctive criterion for the two contradicting penalties (SP and Flogging), was secondary to the involvement of the JC story with that issue.<sup>25</sup>

Bu. A.III On the authority of Ibn ʿUmar:

- a- The Prophet was approached by the Jews with a Jew and Jewess who had committed adultery.
- b- He said to the Jews: "What do you do with those who committ adultery among you?"
- c- "We pour hot water on them and then beat them," they replied.
- c.b "Do you not find the Stoning Penalty in the Torah?" the Prophet challenged them.
- c.d "No! We do not find anything in it concerning SP ," they replied.
- d- ʿAbd Allāh b. Salām said: "Liars! Bring the Torah and recite it if you are telling the Truth!"
- e- A midrās of the Torah, who taught it, put his hand over the Stoning Verse and began to read what was before and after it, thus omitting the Stoning Verse. Then he removed his hand.
- f- He [Ibn Salām]<sup>26</sup> said: "What is this?"

- g- When he said that, they said: "It is the Stoning Verse!"
- h- The Prophet gave his orders to stone them to death.
- i- The couple was stoned to death near the location of funeral prayers at the mosque. I Ibn 'Umar saw her partner leaning over her trying to protect her from the stones. <sup>27</sup>

Bu.K.Tafsīr.C.54

(Sūra.3:93)H.I.

#### COMMENT

A different but more congruent picture for the structure of the pericope begins to emerge. Nearly all the issues and problems which until now have proved difficult to solve are resolved.

Element -a- still introduces the story. But -b- now stands as a couplet for the whole question. The complete question asked by the Prophet is -b- + -c.b-"What do you do with those who committ adultery among you? Don't you find the stoning penalty in the Torah?" Similarly, -c- is a couplet for the whole answer. The other part is -c- + -c.d-. This could also take the form of -c.d- + -c-, "We pour hot water on them and then beat them. We do not find anything in the Torah." This arrangement is then tied up with the rest of the story by -d-, which qualifies -c.b.- and at the same time challenges -c.d-, hence anticipating -e- and -f-. The intrusion of midrāsuhā alladhī yudarrisuhā (a qualified rabbi for the interpretation of the Torah) somewhat justifies the insignificance of Ibn Salām. However, his presence is still vital to identify the relevant verse. Element -h-is

the same. But -i- adds somewhat minute descriptions concerning the location where the penalty was carried out. This means the guilty couple was stoned to death near the mosque, where corpses would usually be laid for prayer. Similarly, the whole pericope, whose elements have now been integrated together, demonstrates that Muḥammed, the Prophet, had stoned the Jews in accordance with what should have been God's judgement in the Torah. He had applied the one and only Divine Injunction which existed in the Torah. With or without the help of Ibn Salām, Muḥammad would have still been able to force proof on his adversaries; it was he who first informed the Jews that their Torah should contain the SV, while Ibn Salām merely identified the verse. The implicit identity of the person who uttered: "What is this?" in element -f- makes either probability possible. He could be anybody, including Muḥammad himself, inquiring about the content of the section which the rabbi covered with his hand. However, the content of -d- uttered by Ibn Salām would entail, at least from the sequential point of view, ascribing element -f- to the same man. The pericope is definitely later than all previous versions.

Now, strangely enough, Bukhārī incorporates this version, not in the Hudūd section, but in the Kitāb al-Tafsīr. There, the rubric runs as follows: **باب قوله تعالى: قل فاتوا بالتوراة فاتلوها إن كنتم صادقين**

Chapter concerning the Word of God:

'Say: Bring the Torah and recite it, if you were telling the Truth.'

(Q.3.93)

This verse has been traditionally connected with a dispute between Muḥammad and the Jews in Medina concerning the latter who imposed upon themselves the prohibition of, or abstention from eating, certain types

of meat, such as that of camels, etc., claiming that this was God's command. Muḥammad was instructed by God to challenge the Jews to bring the Torah and read where such laws are mentioned. Thus Muḥammad told the Jews:

فَاتُوا بِالْتُورَةِ فَاَتْلُوهَا اِنْ كُنْتُمْ صَادِقِينَ

Bring the Torah and recite it if  
you are telling the Truth<sup>28</sup>

Now, whether Bukhārī adduced the ḥadīth in question to show the occasion for the revelation of Q.3.93 or simply the exegesis of the verse is not clear, though the latter is more likely than the former.<sup>29</sup> Whatever the case, one thing is clear. The wording of the challenge was uttered here by Ibn Salām and not by the Prophet. Assuming that we are not dealing with an anachronism here, and granted that Ibn Salām was simply uttering a Quranic verse which had already been revealed to Muḥammad,<sup>30</sup> ascription of the formula to Ibn Salām is very significant indeed. It entails two things: first, it means that Ibn Salām was simply employing something which had already been uttered by the Prophet on a similar occasion and, subsequently that Muḥammad had in principle dealt with the issue single-handed. Both would mean that Muḥammad had applied God's law. This conclusion becomes more evident when we see Bukhārī incorporating this version in the Tafsīr section and not in ḥudūd. In other words, the problems of whether Muḥammad knew the true punishment or not, or whether he had applied the Torah's injunction or not - which are implicit in those versions incorporated by Bukhārī in the ḥudūd section - have now been solved [sic] in the Tafsīr section. Similarly, the employment of those two versions in the ḥudūd section, one concerning the location of the punishment - al-rajām fī al-balāṭ (Bu.A.I.) - and other concerning dhimmis' jurisdiction with reference to

adultery, together with the meaning of their iḥsān, i.e. the irrelevance of religious affiliation for non-Muslims, shows that Bukhārī's concern with the Story of the Jewish couple is that the source of the SP is not the Torah, rather it is God's judgement as it was established by the Sunna of the Prophet. Thus, SP is an Islamic penalty and when non-Muslims are judged by Muslims, God's laws should be applied irrespective of their beliefs.

By contrast, the employment of this version in the Tafsīr section reveals Bukhārī's awareness of the original function of the story concerning prophetic credentials. But attempts to unify this composite story did not end there with reference to Bukhārī's work. A more blatant attempt to exclude Ibn Salām from the scene completely can be found in the fourth and final version of Bukhārī.

Bu.A.IV      On the authority of Ibn 'Umar

- a- Same as Bu.A.III
- b- The Prophet said to the Jews: "What are you going to do with them?"
- c- "We will pour hot water on their faces and humiliate them." they replied.
- d- He said: "Bring the Torah and recite it if you are telling the Truth!"
- e- They came back with a man of their choice, who was known as "the one-eyed man", to whom they said: "Read!" He read until he reached a point (mawḍi' in minha ....) where he put his hand over it.
- f- He Muḥammad said: "Remove your hand!" He the reciter did and, lo and behold, the Stoning Verse appeared!

g- He said: "O Muḥammad! It is true they should be stoned to death. But we conceal this punishment among ourselves!"  
(natakātamuhu baynanā).

h- Same.

i- I Ibn ʿUmar then saw him the Jew trying to protect the woman from the stones.

Bu.K.al-Tawḥīd.C.47.H.2

#### COMMENT

In this version, the story is presented in a much more unified form which makes it easier to follow. The whole discussion is between Muḥammad and the Jews. Apart from element -i-, which is otiose as far as the congruity of the pericope is concerned, the remaining elements are convincingly arranged to form a complete historical event out of which both doctrinal and juridical issues could be demonstrated. Elements -a-g-, which deal with the former, serve as an introduction to -h-, which is the focal point of the latter. However, what is really important here is the function of the pericope for Bukhārī.

The pericope has been incorporated in the Book of Tawḥīd:

"Profession of the Unity of God". Its rubric runs as follows:-

باب ما يجوز من تفسير التوراة وغيرها من كتب الله بالعربية لقول الله تعالى :  
قل فاتوا بالتوراة فاتلوها إن كنتم صادقين - ...

A chapter concerning the permission to translate the Torah and other Scriptures into Arabic and other languages, as a result of God's words: 'Bring the Torah and recite it, if you are telling the Truth.' 31

In other words, just as the discussion between Muḥammad and the Jews was conducted in Arabic (no other language was possible), the recitation of the Torah was also in Arabic, or at least was translated into Arabic for the benefit of the Prophet! In such a case, Ibn Salām's presence is hardly required. Indeed, Muḥammad - the True Prophet - has dealt with the case single-handed. The employment of the pericope for this end, i.e. prophetic credentials, was prior to its involvement in juridical discussions. The pericope is probably earlier than all the previous versions.

We may now complete our examination of the Story of the Jewish Couple by turning to our last source, Tirmidhī.

Tir.A.I. On the authority of Ibn 'Umar and Jābir b. Samura:

h- The Prophet had stoned a Jewish couple.

Tir.

Hudūd.C.10.H.1,2.

#### COMMENT

This edited and refined version hardly needs comment; it speaks for itself. It is complete in itself. Its function is the dhimmis' jurisdiction. This is how Tirmidhī, who by now had collected enough materials to deal with all those juridical and theoretical issues which were the concern of his predecessors, employed the pericope. Yet, our previous analyses have shown that element -h-, is the only part which has been invariably reported by our three sources. The rest of the elements were subjected to changes and modifications in accordance with dogmatic and juridical consensus (see also synopses below). Even when there were

some attempts to integrate different elements into a completely unified story, the story was only accomplished either through clumsy means, by which the loosely connected elements were amalgamated - see Bu.A.III - or at the expense of other elements - Bu.A.IV. Thus, it seems reasonable to conclude that the materials of -h-, in which the Prophet is briefly but consistently reported to have stoned a Jewish couple for adultery, came early. The subject matter contained therein is admittedly juridical in principle, but none the less, juridical concepts are incongruent with such an early venue, when biographical motives were far more important than juridical matters. However, since the unit did contain a juridical principle, it was not impossible to transform the underlying motive from that of prophetic credential to that of the legality and hence the origin of the SP in Islām. But the change of emphasis, as we shall see in the ikhtilāf section, was generated by the opposition of the Quranic party to the SP for adultery. Their unassailable argument that not only was there no mention of the SP in the Qur'ān, but also that the only available punishment in the Qur'ān was in total contradiction with the SP, must have been provoked by the basic unit of the Story of the Jewish couple, which by that time had been transformed into a juridical principle.<sup>32</sup> In other words, element -h- is the basic unit for the Story of the Jewish Couple. It is complete in itself. Elements a-g + -i- are later augmentations. In fact, -i- is hardly necessary. The story could have been ended without; nothing is required to complete the picture. We do not have to be told about the place where the punishment was carried out, nor about how the culprits reacted. That "event" is not an issue. Yet, as we have seen, Bukhārī considered it vital in order to incorporate a complete pericope. What we are dealing with, in fact, is a juridical dispute concerning whether a mosque can be used for applying punishment. Bukhārī is of the opposite opinion. Similarly, his employment of Mālik's version<sup>33</sup> for the iḥsān of dhimmis reflects his



support for the irrelevance of religious affiliation of non-Muslims when they seek the judgement of a Muslim judge - termed Imām <sup>34</sup> - a notion which was argued by Shāfi'ī in opposition to his predecessors Abū Ḥanīfa and Mālik. <sup>35</sup> This is how Bukhārī adduced the Story of the Jewish couple in the Hudūd section. As for the other doctrinal (dogmatic) issue, i.e. prophetic credentials, Bukhārī incorporated slightly different versions in two different places: the Kitāb al-Tafsīr and the Kitāb al-Tawhīd. In both places, Q.3.93 was interpolated to that end.

Mālik, less concerned with these details, employed the pericope to demonstrate the legality of the SP. He was reacting to the situation of his time. It was Tirmidhī who adduced the basic unit for dhimmis' jurisdiction. He was in a position to do so due to the existence of a number of different Prophetic ḥadīths for the legality of the SP, on the one hand, and to the fact that the problem was no longer an issue, on the other. But we have come a long way to reach that stage.

Now, I have constantly argued that the establishment of prophetic credentials was the prime function/motive of this story and that its involvement in juridical matters was achieved at a secondary stage. With reference to juridical matters, I will have more to say in subsequent chapters. Here I want to take up the issue of the original motive of the pericope.

The earliest available source transmitting the story is the Sīra of Ibn Ishāq (d.150) preserved by Ibn Hishām (d.218). <sup>36</sup> Whether or not the language, components and structure of the story are an accurate preservation of Ibn Ishāq's forms is less important than the fact that the preservation has been pieced together from a conglomeration of materials ascribed to three different Companions: Abū Huraira, <sup>37</sup> Ibn 'Abbās, <sup>38</sup> and Ibn 'Umar. <sup>39</sup>

The overall structure of their accounts [sic] can be divided into four parts:

- I. Rehearsal/Introduction: How, when and where the story arose.
- II. Performance: The detailed account of what had actually happened, and who was directly involved.
- III. Climactic End: Recognition of God's true judgement from the Torah, and realization of that punishment (application of the SP).
- IV. Review: Quranic revelation concerning certain developments of the story.

Within these parts, Ibn Hishām occasionally intervenes to provide glosses or commentary, and sometimes to provide additional accounts. The accounts run as follows:-

#### Version A

- I. Ibn Ishāq said:

I was told by Ibn Shihāb who said that he had heard a well-versed man of the Muzaina tribe <sup>40</sup> informing Ibn Musayyib that Abū Huraira had told them that: <sup>41</sup> "When the Prophet arrived at Medina, Jewish rabbis gathered together in their Academy (Midrās) to discuss a case of adultery by a muḥṣan Jew and a muḥṣana Jewess. <sup>42</sup> Having agreed among

themselves, they said: "Let us send the couple to Muḥammad and see how he would judge them. We shall ask him to be their arbiter. If he prescribes to them our tajbiya (Ibn Hishām comments: 'tajbiya means scourging with a rope of palm fibre smeared with pitch, then blackening their faces and mounting them on different donkeys with their faces towards the donkeys' tails'), then we will follow him; for he would be a king worthy of being believed in. But if he prescribes the Stoning Penalty, then he is a prophet; beware, lest he deprive you of what you possess.'

II. a- So they brought the couple to the Prophet saying: 'O Muḥammad, this muḥṣan man has fornicated with a muḥṣana woman. We appoint you arbiter over their case? What is your judgement?'

a.b- The Prophet went to see their rabbis at the Academy and said to them: 'O Jewish people, bring out to me your scholars!' They sent to him 'Abd Allāh b. Ṣūria.<sup>43</sup>

(Ibn Hishām says: "Ibn Ishāq said 'I was also told by some member of Banū Quraiza.<sup>44</sup> that among those who were sent to the Prophet, including Ibn Ṣūria, were Abū Yāsir b. Akḥṭab<sup>45</sup> and Wahb b. Yahūda.'")<sup>46</sup>:

The Jews said: "These are our scholars."

The Prophet questioned them until he discovered their affair (plot!) when they said, pointing to Ibn Ṣūria: "This is the most learned living man in the Torah."<sup>47</sup>

He was the youngest of them. The Prophet took him to a private place and then kept on pressing him with questions urging him:

III "O son of Šūria, I ask you in God's name and remind you about His previous punishments of the Banī Isrā'īl. Do you or don't you know that God has sanctioned the SP in the Torah for those who committ adultery after attaining the status of Iḥsān?"

He said: "Yes, I know He has. But, O Abū al-Qāsim, the Jews know perfectly well that you are a prophet sent by God but they envy you."

So, the Prophet went away and gave his orders to stone the couple to death.

They were stoned to death at the gate of his mosque near the quarters of Banī Ghunm b. Mālik al-Najjār. Later on, Ibn Šūria abandoned his Islamic faith (!) and denied that the Prophet was a true prophet. <sup>48</sup>

IV. Ibn Ishāq said: So God revealed Q.5:41:

"O Apostle of God! Let not them grieve you who vie one with another in the race to disbelief, of such say with their mouths: 'We believe,' but their hearts believe not, and of the Jews; who listen to lies, listeners on behalf of other folk who come not to you (i.e. those who sent to you whomever they had sent while they themselves stayed behind and instead giving them their orders to change the injunction from its place) changing words from their context and saying: 'If this be given to you, accept it, but if this (i.e. the SP be not given to you, then beware...'" <sup>49</sup>

#### Version B

Ibn Ishāq on the authority of Ibn 'Abbās:

a - g      Missing

- IV. h - i The Prophet gave his orders to stone a Jewish couple, who were stoned to death at the gate of his mosque.
- When the stones were hurtful, the Jew crouched over the Jewess protecting her from the stones. But they were stoned until both of them were killed.
- j - This is what God did for the apostle in exacting from the Jewish couple the penalty for adultery. <sup>50</sup>

#### Version C

#### II. Ibn Ishāq on the authority of Ibn 'Umar:

- d - When the Jews appointed the Prophet as the arbiter over the Jewish couple, he sent for the Torah.
- e - A rabbi sat there reading it having put his hand over the Stoning Verse.
- f - Ibn Salām struck the rabbi's hand, saying:
- "O the Prophet of God! This, here, is the Stoning Verse which he refuses to read to you."
- f.a- The Prophet said: "Woe to you Jews! What has induced you to abandon God's judgement which you yourselves hold in your hand?"
- g - They replied: "By God! It's true that we used to apply it.
- g.a- But one day a man of the royal household and dignity committed adultery after attaining the status of iḥṣān. <sup>51</sup>
- The king refused to let him be stoned to death. Later on, another common man committed adultery after attaining the status of iḥṣān and the king wanted him to be stoned to death. But people said: 'No, not until you stone

so-and-so.' When they said that, they agreed to apply tajbiya and to do away with the SP."

g.b- The Prophet said: "I am the first to revive God's injunction and His book and to practise it."

III. h- He gave his orders to stone them to death.

i- They were stoned to death at the gate of his mosque. I was among those who stoned them to death.

IV. Ibn Ishāq on the authority of Ibn 'Abbās: <sup>52</sup>

Q.5:42 was revealed with respect to blood money between Banū al-Naḍīr and Banū Quraiza ....

But God knows which account is correct. <sup>53</sup>

#### SUMMARY

The incident took place during the first year of Hijra, almost immediately after Muḥammad's arrival in Medina. The Jews organized themselves to test Muḥammad's claim to prophethood. The examination was conducted by Ibn Ṣūria who eventually conceded Muḥammad's knowledge of God's true judgement. The Jewish couple were stoned to death. Q.5:41 was revealed. But it is not agreed whether Q.5:42 was also revealed at this incident. <sup>54</sup>

In reporting the deposition of the Jewish couple taken for adultery, neither the ḥadīth sources nor the Sīra offers a simple coherent narrative which does not depend on another version. The materials of these sources are composite; they expand or edit out what may be presumed were earlier version/s and insert, at undetermined moments, entirely extraneous interpolations. None the less, not

unrelated, but sometimes contradicting juridical issues appeared to be the main reasons for incorporating these narratives in the hadīth compendia. Yet their juridical adductions would seem to be posterior to their biographical motive.

In the Sīra, the prime motive for thrice retelling these narratives in fragmentary forms, was to determine Muḥammad's prophetic identity.<sup>55</sup> The issue itself came to embrace a wide range of trivial discussions between Muḥammad and the Jewish community at Medina.<sup>56</sup> Thus, it is quite possible that the narratives were developed out of contemporary "archival" records freely available.

They may well have had their origin in some historical "event", but as we have them now they are full of anonymity (a man of Muzaina, some members of Banū Quraiza) anachronisms (Abū Huraira, Ibn 'Abbās and Muḥammad's arrival at Medina),<sup>57</sup> legends (Ibn Šūria, Wahb b. Yahūda, Ibn Salām and to some extent, Ibn 'Umar),<sup>58</sup> inconsistencies (cf. synopses below), myth (anonymous king (!) who was involved in doing away with the SP), and exegetical interests (i.e. Q.3:93 and occasions of revelation of Q.5:41,42(!) and 44). Thus, the traditionists, while perhaps acknowledging the fragmentary forms of the surviving details, did not question their essential reliability. Their method therefore consisted of gathering as many selected details as they could, and then synthesizing the data thus collected to suit their own immediate needs.

Nevertheless, all narratives have one thing in common. The Prophet had stoned to death a Jewish couple. This is the basic unit of the Story of the Jewish couple.<sup>59</sup> The unit then was furnished with the concept "event". The furnishing of details, however, was the property of individuals - starting first, presumably, with the story-tellers (a man

of Muzaina, some members of Banū Quraīza, etc.), and ending with recognized isnāds within the traditionists' circles. <sup>60</sup>

A glance at the synopses below will perhaps help to follow these developments, which could then be compared with the Sīra accounts above.



## SYNOPSIS (A)

### Element a- Muhammad's involvement with the case

- 1) Was informed about a Jewish couple guilty of adultery

Mā.Ḥudūd: C.1.H.1

San. H.13330, p.316.

Bu. Ḥudūd: C.37.H.2,4.

Bu. Manāqib: C.26.H.1.

Daw. Ḥudūd: C.26.H.4446/4450/51.

Bay. Ḥudūd: vol. VIII, p.214.

- 2) A Jewish couple guilty of adultery were brought to him.

Tay. H.1856

San. H.13331/2, p.318.

Han. vol.II, p.5.

Bu. Ḥudūd: C.24.H.1.

Bu. Tafsīr: Surat.3.c.6.H.1.

Bu. Tawhīd: C.51.H.2.

Mu. Ḥudūd: C.6.H.26.

Daw. Ḥudūd: C.26.H.4452.

Ḥak. vol. IV, p.365.

Bay. vol. VIII: Ḥudūd, pp. 215/246/7.

- 3) A procession humiliating a Jewish couple who were guilty of adultery, passed by Muhammad.

Mu.Ḥudūd: C.6.H.4.

Daw. Ḥudūd: C.26.H.4447/8.

Bay. Ḥudūd: vol. VIII, pp 214, f.246.

- 4) Muḥammad passed the Jews humiliating a couple of their own who were guilty of adultery.

Han. vol. IV, p. 286

Jah. Hudūd: C.10.H.3.

- 5) Muḥammad was invited by the Jews outside Medina to give his judgement on a Jewish couple convicted for adultery.

Daw. Hudūd: C.26.H.4449.

Element b- Muḥammad's first response

- 1) "What is the Torah's injunction for such cases?"  
(cf.a-(1) and (2) above)

Mā. Hudūd: C.1.H.1.

Tay. H.1856

Han. vol. II, p.5.

Bu. Hudūd: C.24.H.1, and C.37.H.2.

Bu. Manāqib: C.26.H.1.

My. Hudūd: C.6.H.4.

Daw. Hudūd: 26.H.4446/7, cf.H.4452

Dar. Hudūd: 15.

Bay. Hudūd: vol. VIII, p.214.

- 2) "What does the Torah say concerning an adulterer who has attained the status of Iḥṣān?" (cf. A-(1) and (2) above)

San. Hudūd: H.13330

Daw. Hudūd: C.26.H.4420.

- 3) "Do not you find the Stoning Penalty in your Scripture?"

San. Hudūd: H.13331.

Han. Vol. II, p.5

Bu. Tafsīr: Sūra 3.C.6.H.1.

Daw. Aqdiyya: C.26.H.3626

Daw. Hudūd: 26.H.4450

Dar. Hudūd: 15.

- 4) "What do you do with those who have committed adultery among you?"

San. Hudūd: H.13332.

Bu. Tafsīr: Sūra 3.C.6.H.1.

cf. Daw. Hudūd: C.26.H.4452

Bay. Hudūd: vol. VIII, p.246.

- 5) "Is this how you find the punishment of adulterers in your Scripture?"

(cf. a-(3) and (4) above)

Han. vol. IV, p.286.

Mu. Hudūd: C.6.H.4.

Jah. Hudūd: 26.H.4448.

Bay. Hudūd: vol. VIII, p.246.

Element c- Jews'reply to -b-

- 1) Flogging.

San. H.13332.

- 2) Hot water and flogging.  
San. H.13330/1.  
Han. vol. IV, p.286  
Bu. Tafsīr: Sūra 3.C.6.H.1.  
Mu.Ḥudūd: C.6.H.4.  
Daw. Ḥudūd: C.26.H.4450  
Bay. Ḥudūd: C.4.H.8, and C.37.H.4,5.
  
- 3) Humiliation and flogging  
Ma.Ḥudūd: C.1.H.1.  
Bu.Ḥudūd: C.37.H.2.  
Bu.Manāqib: C.24.H.1.  
Daw. Ḥudūd: C.26.H.4446.  
Bay.Ḥudūd: C.4.H.7.
  
- 4) Hot water on their faces and humiliation.  
Han. vol. 2, p.5  
Bu. Tawhīd: C.51.H.2.  
add "Our rabbis have invented ....."  
Bu. Ḥudūd: C.9.H.1.
  
- 5) Blacking their faces and mounting them backwards on a donkey and parading them through the town.  
Mu. Ḥudūd: C.6.H.1.  
Daw. Ḥudūd: C.26.H.4447  
Daw. Ḥudūd: C.26.H.3/5/7.

Element d- The Challenger:

- 1) Ibn Salām: "Liars! There is a Stoning Verse!"  
Ma. Ḥudūd: C.1.H.1.

Tay. H.1856.

San. H.13332 - add. Q.3:93.

Bu. Hudūd: C.24.H.1 - add "ask them to bring the  
Torah " (cf. Mu.Hudūd. C.4.H.1.)

Bu. Hudūd: C.37.H.2.

Bu. Tafsīr: Sūra 3.C.6.H.1 - add Q.3:93.

Daw. Hudūd: C.26.H.4446

Bay.Hudūd: C.4.H.7.

Bay.Hudūd: C.37.H.4 - add Q.3:93.

2) The Prophet:

Han. vol. II, p.5 - add Q.3:93

Han. vol. IV, p.286.

Bu. Tawhīd: C.51,H.2 - add Q.3.93

Mu. Hudūd: C.6.H.1. - add Q.3:93

H.4. omit Q.3:93

Jah.Hudūd: C.10.H.3

Element e- The Torah was brought for consultation.

1) (See d-(1) and (2) above).

2) The Torah was not brought for consultation but only  
there was a discussion between Muḥammad and some  
learned Jews during which Muḥammad appealed to them to  
tell the truth.

San.H.1330

Han. vol IV, p.286.

Mu. Hudūd: C.6.H.4.

Daw. Hudūd: C.26.H.4447-9 4451 -2

Daw. Aqdiya: C.27.H.4446-7.

Jah. Hudūd: C.10.H.3

Bay. Hudūd: C.4.H.8.

Bay. Hudūd: C.37.H.5,6 and 7.

Element f- "Remove your hand"

(corresponds with d-(1) and (2) above)

(add. 3- Ibn Salām removed his hand and said to him "What is this?")

4- Ibn Salām hit his hand and said to him: "What is this?"

By. Hudūd: C.37.H.4.

5- Ibn Salām said to the Prophet: "Tell him to remove his hand."

Mu. Hudūd: C.6.H.1.

Element g- Jews' admission.

(corresponds with e-(1) and (2) above)

Element h- The Prophet had the Jewish couple stoned.

ALL

Element i- Location of the penalty.

1) Pavement

Tay. H. 1856

Han. vol.II, p.62

Bu. Hudūd: C.24.H.1.

- 2) Near the mosque where biers would be put.  
San. H. 13332.  
Bu. Tafsīr: Sūra 3.C.6.H.1.
- 3) At the gate of the mosque.  
Han. vol. I, p.261 (cf. Bay.Hudūd C.37.H.6)
- 4) In front of (his) the mosque at Banī Ghunum.  
Hak. Hudūd: H.63  
Bay.Hudūd: C.37.H.6 - add  
 ... b. Mālik al-Najjār.

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The basic unit of the story: "The Prophet had stoned Jews" has been reported widely by almost all traditionists together with the early fuqahā' of the Pr.F.P.

1. Abū Yūsuf: Ikhtilāf, p.221.

But in the Kharāj, Abu Yusuf provides a different version:

61

I was told by Mughīra (d.136) who was told by Ibrāhīm (d.96) that:

The Jews asked the Prophet: "What is the SP for?" The Prophet replied:

"When four people bear witness that they have seen it penetrating inside like the kohl stick when it is put in the kohl bottle, then the SP is a must".

Kharāj: p.98. L.2.

2. Shāfi'ī: Risāla: no. 692

Umm: vol. 6, p.124, vol. 7, p. 150.

The Traditionists

San. H.13333

Han. vol. I, p.261

vol. II, pp.7, 17, 62, 63, 76, 126, 151 and 280.

vol. IV, p. 355

vol. V, pp. 91, 94, 96, 97 and 104.

Mu. Hudūd: C.&.H.2 and 6

Tir.Hudūd: C.10.H.1 and 2

Jah. Hudūd: C.10.H.1 and 2

Hak. Hudūd: H.63

Bay. Hudūd: H.9



## CHAPTER II

### (B) THE STORY OF MĀ'IZ

Our next ḥadīth is about a man who came to be known as Mā'iz b. Mālik al-Aslamī. The man, whose identity was not clear from our early ḥadīth sources, is reported to have committed adultery but his conscience did not allow him to keep it to himself.<sup>1</sup> He goes to Muḥammad and confesses. Muḥammad disapproves of this or at the least, pays no attention to his confession. But the man persists until Muḥammad gives way and has the man stoned to death. This ḥadīth came to be known as the ḥadīth of Mā'iz and has been traditionally associated with the validity of confession on the one hand, and the necessity of four-fold confession for adultery on the other. Similarly, the ḥadīth came to occupy a prominent position in the argument for the legality of the SP in Islām<sup>2</sup> and has naturally been reported in various forms by almost all compendia of the ḥadīth literature.<sup>3</sup> I have chosen to call it: The Story of Mā'iz.

#### Ma.B.1.

On the authority of Ibn Musayyib:<sup>4</sup>

a- A man of Aslam (tribe) went to Abū Bakr<sup>5</sup> and said:

"The despicable one (or your miserable servant) has committed adultery." (Inna al-akhir zanā!) Abū Bakr said:

"Have you mentioned this to anyone else?"

"No," the man replied.

Abū Bakr said: "Go and repent to God and seek refuge with Him; for God accepts the repentance of His creatures!"

The man did not like this; so he went to ʿUmar<sup>6</sup> and said to him what he had said to Abū Bakr. ʿUmar advised him in the same manner as Abū Bakr had. The man did not like this; so he went to the Prophet.

b- He said to him: "The despicable one has committed adultery!"

Ibn Musayyib said: "The Prophet turned away from him three times, each time turning his face from him.

But when it was too much for him,

c- The Prophet sent for his family inquiring:

"Is he sane or mad?"

His family replied: "O Prophet of God, by God he is sane."

The Prophet said: "Is he virgin or not virgin?"

"Certainly, he is not virgin!" they replied (bal huwa thayyib yā Rasūl Allāh!)

d- Thus, the Prophet gave orders to stone him to death, and he was stoned to death.

Ma.Ḥudūd. C.1.H.2.

#### COMMENT

This is the first version of what became the Māʿiz pericope to come down to us as far as the surviving ḥadīth sources are concerned. It refers to a historical incident. In it, three juridical points have been demonstrated.

1 - The mode of confession; 2 - The marital status as well as the sanity of the confessor; and 3 - The appropriate penalty. As such, the pericope

may be categorized as historical in content but juridical in form. Element a- and b- deal with the validity and mode of confession for adultery. Element c- deals with preliminary procedures of the accountability of self confession and, d- is the result of a-c.

Strictly speaking, however, from a juridical point of view, element -a- has very little, if anything, to do with b-d. They deal with the validity of confession and the prescribed penalty respectively whereas -a- deals with the piety of the confessor, exhibited in his insistence upon the need of being purified from the sin which he has committed. Nevertheless, it is a prelude for the understanding of the motive and intention of the confessor, whose piety never allowed him to keep his crime to himself. In other words -b-d do not depend on -a-, although they rely upon it for their contextual meaning. To my knowledge, no one has ever considered that the confessions made to Abū Bakr and ʿUmar should be seen as confessions and nothing more.<sup>7</sup> They have no juridical significance. Legally, element -a- is otiose. Its function is exegetical and hence it will not be inappropriate to identify it as being tendentious.<sup>8</sup>

Element -b- tells us how the man made his confession before Muḥammad. There, the transmitter - Ibn Musayyib - explains how Muḥammad reacted, first turning away from the man three times, until it was too much for him. In it, we see no direct communication between Muḥammad and the confessor. Similarly, Muḥammad's refusal to take notice of the man exhibits his disapproval of such conduct. Implied there is his implicit advice to the man to go away and repent and not to expose himself to the prescribed penalty which must have been known to both parties.<sup>9</sup> In other words, the justification for linking element -a- with -b-, and hence with the rest of the pericope, is exegesis of the content of the

element -b-. As much as Abū Bakr and ‘Umar urged the man to repentance, so did the Prophet. However, being the executor of God's laws, Muḥammad was in no position to offer explicit advice as his close associates, Abū Bakr and ‘Umar, did.<sup>10</sup> Instead, he turned away from the man. But the man, who was very pious, would not have settled for anything but to be purified.

Element -c- then tells us what line of action Muḥammad took to fulfill the wish of this pious confessor. Without speaking a word with him, he sent for his family inquiring first about his sanity and secondly about his marital status. Having satisfied himself that the man was sane and that he was not a virgin, i.e. married, divorced or widowed in the eyes of law, Muḥammad, still without speaking a word to the man himself, gave his orders to apply the appropriate penalty (element -d-). Thus, a man who had committed a certain crime, adultery, with a fixed penalty, stoning to death, was punished accordingly. The qualifying criterion was his marital status: (أَبْرَهُوْا مَثِيْبًا؟ بَلْ هُوَ ثِيْبٌ يَارَسُوْلَ اللهِ) thayyib. Nevertheless, the congruity of the content and form of the pericope appear to be disturbed by a curious relationship and intrusive components, which lead me to believe that the pericope is composite.

As I have already pointed out, element -a- has no juridical significance. Its role is to determine the motive of the confessor on the one hand and to explain Muḥammad's refusal to take notice of the presence of the confessor on the other. The man wanted to be purified and nothing else, while Muḥammad reacted by hinting to the man to go away and repent. In other words, the understanding of Muḥammad's behaviour, as much as the appreciation for the persistence of the confessor in element -b-, depends on the understanding of the element -a-. The need to point out the relevance of element -a- within the pericope is a clear

proof, at least to me, of it's intrusive nature. What we are confronted with here is not ahistorical account but an inter-schools-juridical discussion. The implication is that what does matter is not the number of confessions made before Muḥammad, rather it is how he reacted to such conduct. Prior to him, Abū Bakr and ʿUmar had reacted similarly, though admittedly more explicitly than Muḥammad. It was circumstances which led to several confessions before Muḥammad.<sup>11</sup> Such was the attitude of the early Medinians as opposed to that of the Iraqis, who insisted that confession for adultery must be pronounced four times at different places<sup>12</sup> to correspond with the demand of four witnesses for qadhif-unproven sexual accusation imposed by the

Q.24:4

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم  
ثمانين جلدة ولا تقبلوا لهم شهادة أبداً وأولئك هم الفاسقون

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), - flog them eighty lashes; and reject their evidence ever after; for such men are wicked transgressors .... "

The Medinians on the other hand insisted that, provided the culprit is sane, his single confession is valid. I will have more to say on this point in section two.<sup>13</sup> Here, I want only to point out that the pericope under discussion, which, incidentally, was also employed by the Irâqis to support their view,<sup>14</sup> has been reshaped by the Medinians to show that the number of confessions is irrelevant. This was achieved in two ways: First, by showing that the man did confess to Abū Bakr and ʿUmar prior to Muḥammad and secondly, by showing that Muḥammad reacted in the same way by implying to the man that he should go away and repent. That the man had to insist on confessing is not a proof that confession for adultery

must be pronounced four times. Nevertheless, just as the Medinians reshaped the pericope to support their view point, so did others to refuse or support the opposing view. Different versions of the same story, containing contrary accounts for this particular point came into existence. The contradictions, as can be seen from the synopses below, make it almost impossible to discern any logical conclusion of this particular point. Indeed, the mode and number of confessions in the pericope before us were the main points of variation which led not only to the reinterpretation of one particular version but also to proliferation of intricate and mutually exclusive details. Just how this was achieved will be seen later.

Element -b-, as we have noticed, tells us how the man confessed before Muḥammad. His words are identical to those of element -a-. However, Muḥammad's response is interrupted by a not uncommon interpolation: "qāla Sa'īd", who transmitted the pericope. Traditionally, such interruption is for the explanation of a problem from within a pericope, or for glossing a difficult word or phrase, or to point out other variations of a specific issue,<sup>15</sup> etc., all of which, it may appear up to this stage, are absent. Furthermore, Ibn Musayyib (d.93 or 94) is not, and could have not been, an eye witness to the incident. Why then, one may ask, does the name of this transmitter reappear at this particular point? Could it be that Yaḥyā b. Sa'īd (d.143),<sup>16</sup> Mālik's immediate transmitter, knew another version of this point different from that of Ibn Musayyib or, at least, that this is to show that the information contained therein belongs exclusively to Ibn Musayyib. Whichever implication one may decide to follow, the detailed account of this element appears to belong either to Ibn Musayyib's own information or to that of Yaḥyā. I incline to see the information which comes after: qāla Sa'īd, as being intrusive to the main body of the pericope. It

reveals the concerns of the jurist who was responsible for the wording of the pericope. Its function is to exhibit why the man had to confess several times before Muḥammad. Similarly, it underlines the dependance of this version upon an earlier version of the same incident. Yaḥya's death could possibly be taken as terminus ante quem. The marital status, exhibited here as: a bikrun huwa am thayyib is undoubtedly a juridical point and most probably belongs to the same person responsible for the reshaping of the incident. However, while the reshaping of the mode of confession exhibits inter-school juridical discussion, the interpretation of the thayyib v. bikr criterion demonstrates the traditional attitude towards that of the textualists who opposed the SP being un-Islamic.

Expressed in an antithetic form, the terms could not mean anything, from the legal point of view, but unmarried v. married, or virgin v. non-virgin. The pair in plural forms appears in Qur'ān 66:6 thayyibāt wa abkārā - translated as non-virgins and virgins. All other versions of the same pericope on this point, employ muḥṣan or derivatives of iḥṣān, which, unlike thayyib and bikr, has several meanings. It could mean: chaste, betrothed, free, Muslim, unblemished reputation, married, etc.<sup>17</sup> Its opposite is: ghayr muḥṣan.<sup>18</sup>

Now, the employment of the antithetic forms: bikr v. thayyib, in Mālik's version, with their limited meanings, is very significant indeed. However, to understand its significance fully, I would ask why all other versions used "aḥṣanta?" or "muḥṣan" etc.? Like "thayyibāt wa abkārā", being Quranic terms, derivatives of iḥṣān have also been used by the Qur'ān for different meanings including those which have already been mentioned.<sup>19</sup> However, when the word iḥṣān, or its derivatives, appears in the pericopes dealing with adultery, its meaning is always

confined to marriage.<sup>20</sup> The motive for such is to harmonize the contradiction between the flogging penalty, the only penalty for adultery imposed by the Qur'ān,<sup>21</sup> on the one hand, and the stoning penalty established by the Sunna on the other. My argument is that the employment of thayyib and bikr appears to be among the earliest attempts to react to the same situation.<sup>22</sup> I incline to see the antithesis as intrusive. In short, the pericope under discussion is composite. Its components were formulated and put together for juridical purposes. The basis of these components is a single "popular" historical incident, whose basic unit is probably: "A man was stoned to death as a result of his confession before the Prophet". Thus, only the first doublet of element -b- and element -d- appear most likely to be the repertoire of the story of Mā'iz. My hypothesis may possibly be clearer after the analyses of other versions from our two remaining sources.

Now, Bukhārī transmits the story of Mā'iz eight times at different places, five of which are within the hudūd section. The remaining three are: twice in the Book of Divorce, C.11.H.2 and 3; and once in the Book of Aḥkām (Legal Decisions); C.19.H.1. In the Divorce section, the pericope has been adduced to show that confession of a sane person only is valid and legally binding, while in the Aḥkām section, the pericope has been employed to show that a mosque cannot be used for the application of a punishment.<sup>23</sup> I will begin with the versions of the hudūd section, though the Book of Divorce comes before the hudūd.

#### Bu.B.1.

On the authority of (Muḥammad b. Muqātil ..... Ibn Shihāb), Jābir b. 'Abd Allāh:



- a- No corresponding element.
- b- A man of Aslam approached the Prophet and informed him (fa haddathahu) that he had committed adultery. He gave evidence against himself four times.
- c- Missing.
- d- The Prophet ordered the man to be stoned to death so he was.
- e- The man was (incidentally) muḥṣan (wa kāna qad uḥṣina).

Bu. Hudūd: C.21.H.3

#### COMMENT

The pericope is reported throughout in indirect speech. Element -d- now depends directly on -b-, but -e- is an addendum justifying the application of the SP. in -d-. Element -a- is still missing; it is insignificant anyway. Again, nothing is known of the identity of the culprit other than that he is a man of the Aslam tribe. Muḥammad's first and second reactions are missing; we are not told how Muḥammad behaved towards the man when he started confessing nor about the inquiry as to the mental and marital status of the confessor. Element -b-, however, states explicitly that the man bore witness against himself four times before the Prophet. Element -c- is missing. Element -d- is the first and last response of Muḥammad. Element -e- is then abruptly introduced. It simply recalls that the man was muḥṣan. The pericope is much better reported than that of Mālik. Despite what seems to be a strange addendum at the end - which exhibits the awareness of the reporter as much as revealing his profession, i.e. jurist, elements b-d are harmoniously

linked together, at least from the narrative point of view. By means of indirect speech, the transmitter has managed to tell us that a man was stoned to death after giving evidence against himself four times. This, we may recall, is against the intended implication of Ma.B.1. a-c.

Now, the first question one might ask is why element -a- is missing. Secondly, why is the mode of confession also missing. Thirdly, why are Muḥammad's responses, element -c-, also missing. The answer to these questions, I believe, lie within the pericope itself. Nothing need be said for element -a-. I have already pointed out what we could possibly learn from it. Similarly, I have deliberately included the name of Ibn Shihāb <sup>24</sup> (d.124), who appears in the middle of the chain of the transmitters of this pericope.

Ibn Shihāb is a representative of the Medinian school. <sup>25</sup> It is unlikely that he should omit both element -a- and Muḥammad's first response which were tendentiously interpolated in Mālik's version in order to point out that the number of confessions was irrelevant. What we are witnessing here is a contrary attempt to show that it is the number of confessions which is more important than anything else. That is clear from the fact that even the necessary procedure of inquiring about the mental and marital status of the culprit has been edited out. The transmitter, who was completely aware of what he was doing, had only to remind us that the man was muḥṣan, a point which was not an issue between legal schools but between the legal schools and the Textualists, the anti-stoning penalty force. <sup>26</sup> The alterations seem to me to be the work of a single person. The person himself would appear to stand between Bukhārī, the collector of the pericope and Yūnus, <sup>27</sup> the immediate transmitter of Ibn Shihāb. The name of Jābir is just an appropriate peg. I would incline to see Bukhārī's immediate

transmitter, Muḥammad b. Muqātil (d.226)<sup>29</sup> as being responsible for the reshaping of the pericope, most likely against Ma.B.1.

It remains to note that Bukhārī adduces the pericope for the legality of stoning the muḥṣan: Bāb rajm al-muḥṣan.<sup>30</sup> The point of proof is element -e- : wa kāna qad uḥṣina/aḥṣana.<sup>31</sup> The component, however, is tendentiously intrusive.

Bu.B.11

On the authority of (Yaḥyā b. Bukair ..... Ibn Shihāb ... Ibn Musayyib ...) Abū Huraira:

- a- No corresponding element.
- b- A man went to the Prophet, who was in his mosque, and said:  
"O Prophet of God, I have committed adultery". But the Prophet turned away from him until the man repeated it four times. When he bore witness against himself four times;
- c- The Prophet called him and said: "Are you mad?"  
"No!" the man replied.  
"Are you muḥṣan?" (fa hal aḥṣanta?) the Prophet asked.  
"Yes," the man replied.
- d- The Prophet said: "Take him away and stone him to death."
- e- Missing - but of -c- above: Are you muḥṣan?
- f- Ibn Shihāb said: "I was told by a man who quoted Jābir saying: I was among those who stoned him at the muṣallā."

When the stones hurt him, he fled, but we caught him up at  
Ḥarra and stoned him to death."

Bu. Ḥudūd. C.22.H.1

#### COMMENT

Element -d- depends on -c- and -c- in turn depends on -b-. Element -e- is naturally missing; it has been included in -c-, but -f- is a new addendum. The setting is missing but replaced with a similar setting: " .... who was in his mosque ...." for a different reason, i.e., verifying similitude, and hence giving the impression of an eye witness account. The identity of the culprit is much more obscure than in the earlier versions. Muḥammad's first response is briefly but effectively reported: "But the Prophet turned away from him until the man repeated it four times." The combination of Muḥammad's first response, with the persistence of the culprit in confessing up to four times, could reveal both Muḥammad's intention in suggesting to the man to go away and repent on the one hand, and the necessity of requiring a four-fold confession for adultery on the other. This is what one would understand from the expression of: a< raḍa 'anhu ḥattā raddada 'alayhi arba' marrāt - he turned away from him until he repeated it four times (element -b-). The end of element -c- clarifies that it was on the fourth confession that Muḥammad had no choice but to take action for the application of the law.<sup>32</sup> Hence, he first inquired about the mental status of the confessor. Having been satisfied that the confession was legally binding, his next step was to inquire about the marital status of the culprit so that he might apply the appropriate penalty. What is of interest here, is that the inquiry was conducted between Muḥammad and the culprit. Element -d- is the result of b-c. Element -e-, then, ought to

be missing at this place for it has been placed in its proper position in -c-. Element -f- is a fresh unit. Two juridical interests have been demonstrated: 1 - The place where the punishment was carried out, and 2- That the man could not have been tied up, otherwise he would not have been able to flee. <sup>33</sup> Both issues were points of disagreement among the Pr. FP scholars. I will return to these issues at their proper places in the ikhtilāf section <sup>34</sup> Here, however, it is worth recalling that the Medinese were of the opinion that the mosque can never be used <sup>35</sup> to apply a penalty and that a culprit should not be tied up. In other words, element -f- is tendentious, favouring the Medinian attitude. The interpretation of this element, in a pericope whose overall structure favours the Irāqis' attitude with respect to the necessity of a four-fold confession, could be understood as the work of a single person - most probably a jurist. Bukhārī's immediate transmitter, Ibn Bukair - one of Mālik's disciples - would most likely be the first suspect. However, the possibility of containing both the Medinian and the Irāqian attitudes, that is Moḥammad's indirect suggestion for repentance and at the same time his inability to withhold the application of the ḥadd (that is the prescribed penalty - see below Chap.12) after four confessions, appears to exonerate Ibn Bukair from such a responsibility. I would incline to see al Layth, <sup>36</sup> (d. 175 a contemporary of Mālik, but an independent Egyptian jurist), as being responsible for element -f- and for harmonizing the two attitudes. The move reveals awareness of Ma.B.1.a and its primary implication. In this case, Bu.B.II is probably earlier than Bu.B.1. Bukhārī, incidentally, employs the pericope to show that insanity is a barrier to the application of the SP. As for the location - where the penalty was carried out - he adduces another version.

On the authority of (Muḥammad b. Ghailān ....Ibn Shihāb ....)

Jābir:

- a- No corresponding element.
- b- A man of Aslam went to the Prophet and confessed to adultery. The Prophet turned away from him until he (the man) bore witness against himself four times.
- c- The Prophet said to him: "Are you mad?"  
"No!" the man replied.  
"Are you muḥṣan?" the Prophet inquired.  
"Yes," the man replied.
- d- The Prophet gave his order to have him stoned.
- e- (cf. -c- above)
- f- He was stoned at the muṣallā. When the stones hurt him he fled, but was caught up and stoned to death.
- g- The Prophet spoke well of him and offered his prayer for him (performed the funeral prayer for him).
- g.a- Bukhārī adds: Yūnus and Ibn Jurayj transmitting from Zuhri have not said that "the Prophet offered his prayer for him."

Bu.Ḥudūd.C.25.H.1

**COMMENT**

This is an "improved" version of, or closely connected with Bu.B.1. But there are equally intricate issues and problems which are not obvious at the first glance. The first improvement we notice is the balance of direct and indirect disclosures. Muḥammad's first response

has now been included in -b-. Element -c-, missing in Bu.B.1., has been retained. Element -d- is the same and -e- is missing at this place as expected, since it was inserted in -c-. The juridical implication of element -f-, which was put into the mouth of Jābir on the authority of Ibn Shihāb in Bu.B.1., has now been referred directly to Jābir himself. Nevertheless, Ḥarra is missing. Element -g- is a new addition. It is dogmatic. Its function is to show that the culprit was purified. This is exactly why Muḥammad is reported to have spoken well of him and offered his prayer which was considered by Muslims as the last highest reward for anybody from the Prophet. Element -g.a- repudiates the authority of -g-. The pericope is undoubtedly later than Bu.B.1. and 11.

Now, the implication of element -g- was among the points of disagreement among the early fuqahā'. The kernel of the problem was whether or not the Imām should perform a funeral prayer for those criminals who had been punished. The Irāqis saw no harm in doing so arguing that those who had been punished had been purified,<sup>37</sup> while the Medinians, accepting the last part of the argument, took the contrary view on the ground that the Imām's abstention might serve as an example to deter people from committing criminal offences.<sup>38</sup> Element -g- in the pericope under discussion is in favour of the Irāqis. Bukhārī, who presumably was in favour of the Medinians, took the opportunity to point out that other transmitters from Zuhri had not said that the Prophet had prayed for the culprit. (element -g.a-). Following his typical traditionist attitude, Bukhārī takes it for granted that the responsibility of element -g- lies in Ma'mar (d. 154), another immediate transmitter from Zuhri. The isnād for this pericope in Bukhārī runs as follows:

Bukhari: from Maḥmūd b. Ghailān <sup>39</sup> from 'Abd al-Razzāq <sup>40</sup> from Ma' mar <sup>41</sup> from Zuhri from Abū Salama from Jābir.

In other words, Bukhārī removes the responsibility from both 'Abd al-Razzāq and his own immediate transmitter Maḥmūd Ghailān.

Now, 'Abd al-Razzāq is the author of the Muṣannaf which we possess. There we find the same version with the same isnād from the author to Jābir, in which element -g- runs as follows: "The Prophet spoke well of him but did not offer his prayer for him." <sup>42</sup> In other words, as far as 'Abd al-Razzāq was concerned, neither Zuhri nor Ma' mar is responsible for -g-. It is Maḥmūd b. Ghailān, the teacher of Bukhārī, who fabricated the statement which he got from 'Abd al-Razzāq. It is worth noting that Maḥmūd lived and died in Baghdād.

Element -g- is a later augmentation in favour of the Ḥanafite view while -g.a- is an obvious objection by Bukhārī to the implication of -g-.

Bukhārī incorporates the pericope under the rubric which runs: Stoning penalty at the muṣallā. <sup>43</sup> I have already pointed out the implication of such a statement. What we ought to note here is that Bukhārī was of the opinion that a mosque could not be used for punishments; for the muṣallā is a place outside the mosque of the Prophet where funeral prayers were held. Similarly, Bukhārī is of the opinion that such a place does not share the dignity of a mosque. <sup>44</sup>

#### Bu.B.IV

On the authority of Ibn 'Abbās:



- a- No corresponding element.
- b- When Mā'iz b. Mālik went to the Prophet;
- c- The Prophet said to him: "Perhaps you have only kissed, or winked or looked at!" [But the man said: "No!"]  
 "Have you had sexual intercourse with her?"  
 the Prophet asked the man explicitly (.... lā yaknī ....)  
 (Ibn 'Abbās) said: At this stage,
- d- The Prophet gave orders to have him stoned to death.
- g- Missing.
- g.a- Missing.

Bu.Ḥudūd.C.28.H.1.

#### COMMENT

The identity of the culprit has now been revealed. He was Mā'iz b. Mālik [of the Aslam tribe]. Most of the information given by the previous versions has now been edited out, save for element -d-. Our familiarity with the incident is taken for granted. We are only informed about what other versions did not say. However, we do not know if the extended conversation between Muḥammad and Mā'iz took place before or after the inquiry about the mental and marital status of the culprit. We are not even sure if such a conversation took place at all. Nevertheless, that is not important, at least not to the transmitter/s of this version. What is important is that the Prophet did try to send Mā'iz away by using different means. He tried to tell him that his crime was probably committed by his lips or his eyes.<sup>45</sup> But the man was adamant. Realizing that there was no other way of sending him away, Muḥammad asked him explicitly if he had physical sexual intercourse with

her. When he replied affirmatively [confessed to adultery] Muḥammad had him stoned to death.<sup>46</sup> This is how and why Bukhārī incorporated this version under: "Chapter: Can an Imām suggest to a culprit who confesses against himself that he perhaps had only touched or winked?" In other words, is it permitted for a judge to incite a culprit to withdraw his confession<sup>47</sup>. Bukhārī is of the opinion that a judge can and should do so. This was the opinion of Mālik<sup>48</sup> as opposed to that of Abū Ḥanīfa.<sup>49</sup> The pericope is ostensibly haggadic, that is a narrative story developed out of a halakhic, that is juridical version. Nevertheless a deep-seated juridical dispute has been decided in favour of one side. It is a question of whether or not a judge should incite a criminal confessor to withdraw from giving evidence against himself, i.e. saving himself from incrimination. The pericope favours Mālik's opinion. It is worth remembering here that another point connected with this problem is whether a single confession is valid or whether it must be pronounced four times. In other words, did the Prophet delay his judgement in this incident in order to obtain the fourfold confession or did he do so because on the one hand, he was not sure about the mental faculty of the confessor and, on the other hand, he wanted to show his disapproval of confessing. Bukhārī, like Mālik and Shāfi'ī, before him, is of the opinion that a single confession by a sane person is valid. Similarly, again supporting Mālik and Shāfi'ī, he is of the opinion that it is recommended for a Muslim judge to incite a confessor to withdraw from exposing himself to the prescribed penalties.

Bu.B.IV is certainly later than all those versions which we have so far analysed. At the same time this version has definitely been composed to support the implications of Ma.B.I. Judging from its isnād, the pericope seems to have been composed in Baṣra. Bukhārī's immediate transmitter, 'Abd Allāh b. Muḥammad al-Ju'fī (d.229),<sup>50</sup> could probably be taken as its terminus ante quem.

On the authority of ( .... Ibn 'Ufair from Layth ... Zuhri, from Ibn Musayyib) Abū Huraira:

- a- No corresponding element.
- b- A man of the people (rajulun min al-nās) went to the Prophet who was in his mosque and said to him: "O Prophet of God, I have committed adultery" pointing to himself.  
The Prophet turned away from him.  
The man went to the side where the Prophet was looking and said to him: "O Prophet of God, I have committed adultery".  
The Prophet turned away from him.  
The man went to the side which the Prophet was facing. He went on confessing up to four times. When he bore witness against himself four times,
- c- Same as in Bu.B.II and III -c-.
- d- Same as in Bu.B.II and III -d-. (Corresponds also with Bu.B.I. and Ma.B.I).
- e- (cf. -c- above).
- f- Same as Bu.B.II. -f-.
- g- Missing.
- g.a- Missing.

## COMMENT

Nothing need be added here except that the pericope has been developed in favour of the four-fold confession. In this case, it supports Bu.B.I,II, and III and at the same time refutes Ma.B.I and Bu.B.IV. The pericope has been developed in favour of the Irāqis, with respect to the demand for several confessions.

The pericope has an identical isnād with Bu.B.II and hence, al-Layth (d.175) is probably responsible for the wording of the two pericopes. Bukhārī, incidentally, adduces the pericope for asking a culprit whether he/she is muḥṣan or not. In other words, a Muslim judge must ask that question before imposing a penalty of adultery. Consequently, like the rest of the Traditionists, Bukhārī is of the opinion that iḥṣān is the criterion for the stoning penalty in Islām.

Now, as I have already pointed out, there are three more places where the story of Mā'iz has been incorporated in Bukhārī. Twice in the Book of Divorce <sup>51</sup> and once in the Book of Legal Decisions. <sup>52</sup> The former is prior to the Book of Hudūd, while the latter is posterior to the Hudūd. Here is how it has been reported:

### Bu.B.VI

On the authority of (Aṣbagh ... Zuhri ...) Jābir:

- a- No corresponding element.
- b- Like Bu. B.III, but add: "..... the man went to the side where the Prophet was facing and said: ...."
- c- Same as Bu.B.III, but add: " .... called him and said: ....."
- d- Same as Bu.B.III, but add: " .... to stone him at the muṣallā".

- e- Same as in Bu.B.III
- f- Same as Bu.B.III, but add: " ....caught up at Ḥarra ..."
- g- Missing.
- g.a- Missing.

Bu.Ṭalāq:C.II.H.2.

COMMENT

This is possibly the version which Bukhārī had in mind when he pointed out that other transmitters from Zuhri (Bu.B.III) have not mentioned the content of element -g-. However, while it is true that the immediate transmitter of Zuhri for this version is Yūnus there are two transmitters between Yūnus and Bukhārī. These are Aṣbagh (b. al-Faraj, Egyptian, d.225) <sup>53</sup> and Ibn Wahb (Egyptian d.197). <sup>54</sup> Both men are followers of Mālik. Whether they are responsible for the omission of element -g-, that is, if it existed in their time, is not clear. However, I would incline to say that element -g- had not been formulated and hence Maḥmūd b. Ghailān (d.239) - the immediate transmitter of Bukhārī for Bu.B.III - is more likely responsible for the addition. This then, would probably make Bu.B.VI earlier than Bu.B.III, or they are contemporary. However, one must not attach too much importance to the chronology order or inter-influence for these two versions in particular. For the mere dates of their lower respective transmitters are closely connected and hence either version could influence the other for the augmentation or omission of element -g-. My reason for suspecting Maḥmūd b. Ghailān is primarily derived from the fact that he is Irāqī and hence less likely to support the Medinian attitude with respect to the Imām's prayer. Bukhārī, incidentally, employs the pericope to show that

"Insanity assumes no accountability", i.e., a divorce made by an insane husband is void. This is derived from the fact that the Prophet asked Mā'iz if he was sane or not. Were he insane - Bukhārī implies - his confession would have been void. (cf. Bu.B.II on the authority of Abū Huraira which was adduced to show that insanity is a barrier to SP).

#### Bu.B.VII

On the authority of (Abū al-Yamānī ..... Zuhri from Ibn Musayyib from) Abū Huraira: (cf. Ma. B.I. and Bu. B.II).

- a- No corresponding element.
- b- As Ma.B.I., but omitting: "Ibn Musayyib said ...." and replaced with Bu.B.V verbatim.
- c- Omitting "Are you muḥṣan." (Bu.B.II and V).
- d- Same.
- e- Same as Bu.B.I
- f- Missing. (cf. Bu.B.II, III, V and VI).
- g- Missing.
- g.a- Missing.

#### Bu. Ṭalāq.C.II.H.3.

#### **COMMENT**

The pericope is definitely a final edition of Ma.B.I. Its main function is probably to provide a complete, but slightly different isnād

stretching back to Abū Huraira through Zuhri and Ibn-Musayyib in that order. The omission of qāla Sa'īd (e.f. Ma.B.I.b) is designed to rule out the possibility that the information which follows is a personal account of Ibn Musayyib who could not possibly have been an eye witness of the incident. Similarly, the verbal uniformity of Bu.B.V.b, whose chief transmitter is al-Layth, (Egyptian d.175), and that of Bu.B.III.b, whose chief transmitter is Abū al-Yamānī<sup>55</sup> ( a Syrian d.221/2), shows that Bu.B.VII was either developed out of Bu.B.V or, and this is more likely, that each version was developed independently but for an identical aim which is to provide a slightly different but complete isnād of Ma.B.I and at the same time to harmonize the contradicting interpretations of the Medinians and Irāqis for the same element.

Bukhārī, however, employs the pericope to show that insanity assumes no accountability, and here to show that the divorce of the insane is void. The reason for incorporating two versions Bu.B.VI and VII under the same rubric is presumably for the sake of their different isnāds: The isnād of the former goes back to Jābir and the isnād of the latter goes back to Abū Huraira but via Ibn Musayyib. Zuhri however, stands as a common link for both isnāds.

#### Bu.B.VIII

On the authority of (Ibn Bukair ..... Zuhri from Ibn Musayyib from)  
Abū Huraira:

- a- No corresponding element.
- b- Same as Bu.B.II
- c- Same as Bu.B.II, but omitting: "Are you muḥṣan?"
- d- Same as Bu.B.II.

- e- Same as Bu.B.I
- f- Same as Bu.B.II but omitting: " .... at Ḥarra ..."
- g- Missing (ef. Bu.B.III).
- g.a- Missing.

Bu.Aḥkām.C.19.H.1

#### COMMENT

Element -g- is missing, while b-+c+d+f are identical to Bu.B.II. The vital question concerning marital status in -c- is missing, but has been provided as an addendum in element -e-. It is interesting to note that Bukhārī's immediate transmitter here is Yaḥyā b. Bukair, (d.231), the same transmitter of Bu.B.II. Thus, Bu.B.VIII belongs to the same period as Bu.B.II.

Bukhārī, however, adduces this version for the possibility of using a mosque as a "court room" but not as a place where a punishment could be carried out. According to Ibn Ḥajar (d.773)<sup>56</sup> the point of adducing it is the implication of "Take him away and stone him to death" (idhhabū bihi farjumūh), which is interpreted as: "take him out of the mosque" since the case is reported to have been conducted in Muḥammad's mosque in Medina.<sup>57</sup>

At this point we may recapitulate the possible order of these pericopes as far as their mutual influences are concerned. This however is not to provide a terminus ante quem for the story of Mā'iz. Rather it is meant to provide an appropriate possible date for the form or in some cases for certain elements within a given pericope. Bu.II, V and VIII belong to the same period and the death of al-Layth, a contemporary of Mālik but independant Egyptian jurist (d.175) is probably a terminus



ante quem for the forms of these pericopes. They probably belong to a single man.

Bu.B.III and VII belong to the same period and both were most probably developed independently of one another but nevertheless with an identical tendency. The year 221 - the death of Ṣanʿānī and Abū al-Yamānī - is most likely the terminus ante quem for their forms. However, element -g- is a later augmentation and Maḥmūd b. Ghailān (d.239) is responsible for its interpolation.

Bu.B.I and VI belong to the same period, most probably 225. However, they must have been developed independently of one another. The former was developed in Irāq while the latter was shaped in Egypt. Both however seem to be influenced by the available local material for the same story.

Bu.B.IV is probably the latest of Bukhārī's versions. Its content shows awareness of a number of various versions for the same story. Nevertheless, it was developed in favour of Ma.B.I. Its isnād is primarily Baṣran. The death of al-Juʿfī (d.226) provides a terminus ante quem for its form.

This then will take us into our third and final source, Tirmidhī.

There are two version incorporated under one rubric in Tirmidhī. The second version is identical both in form and content as well as in isnād with the Bu.B.III. But the content of element -g- is contrary to that of Bu.B.III -g-. This shows that either this element was reshaped in reaction to Bu.B.III -g- or vice versa. Hence, I will not analyze Tir. B.II other than noting that Tirmidhī considers this version to be

authentic and good - Ṣaḥīḥ Ḥasan - and goes on to provide a list of jurists who disagreed on the question of the four-fold confession. However, its not clear to me on whose side Tirmidhī is. There is no rubric in his work which deals with the confession to adultery. The rubric in question runs as follows: Bāb mā jā' fī dar' al-ḥadd 'an al-mu'tarif idhā raja', that is a chapter concerning waiving the Hadd from a confessor once the criminal has withdrawn his confession. I will recall here that prior to Tirmidhī, Bukhārī had provided an alsmost identical rubric whose tone is highly polemic (cf. Bu.B.IV).

#### Tir.B.I

On the authority of (Abū Kuraib ...) Abū Huraira:

- a- No corresponding element
- b- Mā'iz of Aslam went to the Prophet and said that he had committed adultery. But the Prophet turned away from him. He went to the other side of the Prophet and said: "O Prophet of God, I have committed adultery!"  
The Prophet turned away from him, but the man followed him to the other side and called out:  
"O Prophet of God, I have committed adultery!"  
On the fourth time ....
- c- Missing.
- d- The Prophet gave his orders to stone him to death.
- e- Missing
- f- He was taken to Ḥarra where he was stoned to death.
- g- Missing.
- g.a- Missing.

- h- When stones injured him, he fled running until he passed a man who had a jaw-bone of a camel (laḥy jamal) with which he hit him, as did the rest of the people.
- i- Then, later, they mentioned to the Prophet that he ran away when he found himself at the brink of death from sharp stones.
- j- The Prophet said: "Why did you not leave him alone?" (or you should have left him alone!) (hallā taraktumūh)

Tir. Hudūd.C.5.H.I.

Tirmidhī comments: This is a sound ḥadīth.

#### COMMENTS

The dispensable quality of element -a- hardly needs a comment. The setting is missing in -b-, but the culprit has been abruptly introduced as Mā'iz of Aslam. This shows that by the time of Tirmidhī, the pericope has become well known. The issue of the "required" numbers for confession is better defined than in the previous versions. We are not only given the actual number - " ....On the fourth time ...." - but also the manner in which it took place. Elements -c-, -g- and g.a- are missing despite their importance. Element -c- as we have noticed provides the qualifying circumstances for the SP., while -g- serves schools' dispute. Thus, while the omission of -g- can be understood, I find it difficult to understand the omission of -c- and -e-. It supports my view that element -c- together with its replacement in some other versions by -e-, is intrusive to the basic unit of the pericope.

Element -f-, for the first time as far as our sources are concerned, contradicts all previous versions. As we have seen in earlier

versions, Ḥarra was the second place where the culprit had fled to when the stones hurt him. The first location, which was in accordance with Muḥammad's order (see Bu.B.VI. -d-) was the muṣallā. Here, we see Ḥarra as being the first location from which the culprit fled away after finding himself at the brink of death. A nice verisimilitude has been introduced in this element; " ..... a man, who had a jaw-bone of a camel ..." We may recall that the content of this element was a subject of juridical disagreement concerning the applicability of punishments in a mosque. Element -f- of this version supports the view of Abū Ḥanīfa and his associates as well as that of Mālik, while element -b- supports the view of Abū Ḥanīfa as opposed to that of Mālik and Shāfi'ī. Elements -i- and -j- exhibit later developments of the Ḥanafite's attitude concerning the validity of withdrawal of confession. In short, the composition of this pericope reveals later developments and refinements of a number of components. Element -b- is better composed than in the previous versions. Element -c- (sometimes interpolated as -e-) which I have persistently argued to be intrusive, has been rightly edited out. Thus, -b- depends directly on -d-. Element -f- omits the mention of the muṣallā and makes Ḥarra the first location where the ḥadd was carried out. This would nicely rule out any ambiguity of whether the muṣallā was part of Muḥammad's mosque or not. Elements -g- and its counter challenge (-g.a-) have been rightly edited out. Element -h- is verisimilitude and at the same time an introduction to -i- whose result is -j-. Thus, -b + -d- and -f- are a unit and -h- + -i- and -j- are another unit. Unit (a) deals with the necessity of a four-fold confession, and unit (b) deals with the validity of withdrawal of confession. The pericope however, has been incorporated for the implication of unit (b). Tirmidhī considers this version as being a sound ḥadīth: (hādha ḥadīth ḥasan). The death of Abū Kuraib (a Kūfan d.248) <sup>58</sup> is most likely to be the terminus ante quem for the refinements and also for the unit (b).

In short, Tir. B.II belongs to the same period as Bu.B.III, while Tir. B.I. is later than all the previous versions which we have analysed. The employment of these versions for the validity of withdrawal of confession reveals Tirmidhi's concern with the issue. Conversely, the lack of a rubric dealing with the necessity of four-fold or single confession exhibits Tirmidhi's uncommitted attitude in this matter.

Terminus ante quem for the story of Mā'iz

Now, the story of Mā'iz does appear in earlier works other than the Muwatta' of Mālik, though Mālik himself knows another but obscure version which he claims to have received from Zuhri (d.124).

This version, which I have not analyzed because of its obscurity, runs as follows:

I was told by Mālik on the authority of Ibn Shihāb (al-Zuhri) who said:

A man confessed to adultery during the era of the Prophet and bore witness against himself four times. Thus, the Prophet had him stoned to death.

Because of this, Ibn Shihāb said: a man is accountable for his confession.

(Qāla Ibn Shihāb fa min ajl dhālika yu<sup>7</sup> khadh al-rajul bi<sup>7</sup> tirāfihi 'alā nafsihi) [\* see next page]

Ma. Hudūd. C.I.H.4.

In other words the death of Zuhri could be taken as a terminus ante quem for the story of Mā'iz. But it must also be observed that Zuhri's obscure version was primarily transmitted for the validity of self confession to adultery. Similarly it must be noted that Ibn Shihāb is not and could not have been an eye witness of the incident.<sup>59</sup> Therefore, the pericope was either transmitted primarily by him but in that form only, or he himself had received it, most likely as it is, from somebody else. We may call this version Ma.B.I. (A). Thus, Ma.B.I, which is transmitted from Mālik d.179 from Yaḥyā b. Sa'īd (d.142) from Ibn Musayyib (d.95) must have been composed from Zuhri's version or similar available version at Medina.<sup>60</sup> It is worth noting that neither version identifies the culprit as Mā'iz. It is in Irāq that the identity of the culprit was first offered as Mā'iz b.Mālik. The first version there is that of Abū Hanīfa (d.150) who transmits it from Alqama b. Mārthad<sup>61</sup> going back to Abū Buraīd<sup>62</sup> (a Companion, died in Khurāsān) who is made to receive the pericope from the Prophet (!) The underlying emphasis there, however, is the necessity of four-fold confession.<sup>63</sup>

To sum up, the death of Zuhri (d.124) is most likely to be the terminus ante quem for the story of Mā'iz.

[\* For convenience only, I will call this pericope: Zuhri's lemma]

## SYNOPSIS (B)

### 1) The Number of Confessions

#### Four times

Han. Vol. III p. 323; V.p.90 and 103 (Cf.vol.II.p.286)

Bu. Hudūd: C.21.H.3 and C.25.H.1.

Mu. Hudūd: C.5.H.3 and H.6.

Daw. Hudūd: C.6.H.4377

Tir. Hudūd:C.4.H.1 and 2.

Bay. Hudūd: C.16.H.1, 3 and 6

Hak. Hudūd: H.57

### 2) Four times at a single place

Han. Vol. II.pp.450 and 453. (Cf. Ma. Hudūd: H.4)

Bu. Hudūd: C.22.H.1; C.29.H.1.

Mu. Hudūd: C.5.h.1

Daw. Hudūd: C.24.H.4419 and 4430

Tir. Hudūd: C.5.H.1.

Nas. Hudūd: C.62.H.1

Jah. Hudūd: C.9.H.2.

Bay. Hudūd: C.16.H.1

Hak. Hudūd: H.53

### 3) Four times at different places

Han. Vol. I. p.8; Vol. V.p.34 (Cf. Vol. V.p.217)

Mu. Hudūd: C.5.H.10

Bay. Hudud: C.16.H.4.

- 4) Four times in different days

Han. Vol. V.p.347

Mu. Hudūd: C.5.H.11

- 5) Five times at a single place

Daw. Hudūd: C.24.H.4428

Bay. Hudūd: C.16.H.7.

- 6) Three times at a single place

Mu. Hudūd: C.5.H.5 and H.9. (Cf. Ma. Hudūd: C.1.H.2.)

- 7) Twice at a single place

Mu. Hudūd: C.5.H.4. (Cf.C.5.H.5 and Han. Vol.V.pp.99-103)

Daw. Hudūd: C.24.H.4423

- 8) Twice at different places

Daw. Hudūd: C.24.H.4426

- 9) Twice in a day and twice in another day

Han. Vol. 1. p.314



10) Several times

Han. Vol. III. p.2 and Vol. V.pp. 102 - 217

Mu. Hudūd: C.5.H.

Daw. Hudūd:C.24.H.4421 and 4422

Bay. Hudūd: C.16.H.6.8

Hak. Hudūd: H.54

Other embodied polemic (juridical) problems in different versions of the  
story of Mā'iz

- 1) Mode of stoning: tied up v. untied up; in a ditch v not in a ditch.
- 2) Location of the incident
- 3) The validity of retraction/repudiation (after confession)
- 4) Prayer over the dead culprit by the Imām.
- 5) Place of stoning (location of the punishment)
- 6) Knowledge v ignorance of the consequences for confession.
- 7) How the crime came to be known to Muḥammad.
- 8) Presence and absence of mentioning the status of the culprit.
- 9) Descriptions for physical appearance of the culprit.
- 10) Details of the inquiry: between Muḥammad and the culprit.
- 11) The identity of the culprit. etc. etc.

### CHAPTER III

#### (C) THE STORY OF THE GHĀMIDIYYA

Our next pericope is about an incident concerning a pregnant woman who allegedly went to Muḥammad and confessed to having committed adultery, substantiating her crime by her pregnancy. A great deal of confusion and inconsistency prevails with respect to Muḥammad's early reactions on the one hand, and to the identity of the culprit on the other. Traditionists and Jurists alike have disagreed on both issues. Some versions identify the woman by her tribal affiliation as the Ghāmidiyya, others as the Juhaniyya, while others are content to refer to her anonymously as a "pregnant woman".

The majority of the Classical authors, who were apparently less concerned with textual variations, regarded the "culprits" as being one, and hence all versions, irrespective of their irreconcilable details, are referring to a single incident. Later scholars, however, who were more aware of these problems mainly because of certain objections raised from within the inter-school juridical disputes, came to regard these variations as being references to separate incidents. Consequently, Muḥammad's reactions have been interpreted accordingly. Nevertheless, in all versions, the woman was stoned to death after the delivery of her child. Subsequently, three juridical and one dogmatic issues came to be associated with the ḥadīth. These are: (1) The requirement of legally

binding confession/s; (2) The susceptibility to the ḥadd punishment for conceiving an illegal pregnancy; and (3) The appropriate time for the infliction of the ḥadd punishment upon a pregnant culprit, and finally (4) The religious status of the punished adulterer/adulteress.

The author of our first source, Mālik, refers to the culprit as the "pregnant woman". Nevertheless, the overall structure of his pericope coincides with that of the Story of the Ghāmidiyya.

#### Ma.C.1

On the authority of Ibn Abī Mulayka: <sup>1</sup>

- a- A woman went to the Prophet and said to him that she had committed adultery and that she was pregnant (wa hiya ḥublā).
- b- The Prophet said to her: "Go away until you give birth to the child." (Idhhabī ḥattā talidī.)
- c- After the delivery, she went to the Prophet, but the Prophet said to her: "Go away until you suckle the child." (Idhhabī ḥattā turḍi'ih.)
- d- After suckling the child, she went to the Prophet, but the Prophet said to her: "Go away and put him in custody." (Idhhabī fastawdi'ih.)
- e- She did and then went to the Prophet.
- f- The Prophet gave his orders to stone her to death, and she was stoned to death.

Ma.Ḥudūd.C.1.H.3.

## COMMENT

The content is about a historical incident followed by a prophetic decision from which certain legal proceedings have been demonstrated. As such, the pericope can be categorized as historical in form and substance, but legal in structure. The form is in narrative style furnished with indirect discourse throughout - save for the Prophetic advice which, told in direct speech, would bear greater impact of normative authority. The story itself is abruptly introduced, but proceeds in small units carefully arranged in plain and simple language. Each unit depends accurately on the preceding one: confession, plus pregnancy; child birth; suckling the child; placing the child in custody; and finally, the climactic decision: the Stoning Penalty. As it stands, the pericope is in a fairly unitary form.

Element -a- shows how the case came to be known to Muḥammad: An anonymous woman went to him voluntarily and confessed to having committed adultery. She was pregnant. Element -b- reveals how Muḥammad responded to the situation: he advised her to come back after the delivery of the child. She did so (element -c-), whereupon he advised her again to come back after suckling the child. Again she did as he advised (element -d-), when he asked her to find a guardian. Once more she complied (element -e-) and when she returned this time, Muḥammad had her stoned to death (element -f-). Thus, Muḥammad had stoned to death a pregnant woman after the delivery of her child as a result of her confession to adultery. Nothing whatever is known about the identity of the culprit, nor is anything known about her social or marital status, nor even about her sanity. To be sure, we know nothing about her other than that she was "a pregnant woman". Conversely, we do know that there was no direct communication between Muḥammad and the culprit other than

her confession to him, and that Muḥammad had instructed her on successive occasions to go back for different but "logical" reasons. <sup>2</sup>

Now, as we can see, the confession is followed by the phrase: wa hiya ḥāmil - "and that she was pregnant". This could be either part of the confession, i.e., uttered by the culprit, or a description of the culprit provided by the transmitter. Each proposition will lead to a separate juridical conclusion. The former could mean that her pregnancy was not so obvious and hence her subsequent appearance, undoubtedly some months later, after the delivery of the child, was definitely part of the binding legal confession. Consequently, the fact that even after the delivery of the child, Muḥammad did not stone her to death but asked her to go and suckle the child, after which he asked her to go and put the child in custody, and that she was not stoned to death until well after her fourth appearance is another incident demonstrating that the only lawful confession is a four-fold confession. <sup>3</sup> Conversely, if the phrase cited is not part of the confession but a description of the culprit provided by the transmitter, then the pregnancy must have been noticeable. Consequently, the culprit must have been legally susceptible to the ḥadd punishment from the very moment she confessed, but was saved from the immediate consequence only by her unborn child. In other words, her first confession was legally binding. I, myself, am inclined to accept the latter as being the case for two principal reasons: one is intrinsic, the other extrinsic. Let us first examine the latter.

Mālik persistently maintained that a single confession for adultery is binding. We have already seen how he employed the story of Mā'iz to that end. There, he demonstrated that the reason the man was not stoned after his first confession before Muḥammad was not because his

confession was not legally binding, but because, on the one hand, Muḥammad doubted his sanity and, on the other hand, he was trying to imply to the man that he should go away and repent and thereby not expose himself to the ḥadd punishment. Failing that, Muḥammad inquired as to the man's mental faculties. The situation of the pregnant woman was different. In addition to her confession, she was obviously pregnant. Had it not been for her unborn child, she would have been stoned to death immediately.<sup>4</sup> Yet Muḥammad had equally tried - unfortunately to no avail - to give her a chance of repentance even after the birth of her child. She, however, would settle for none but the ḥadd punishment and was consequently stoned to death.

As for my intrinsic reason, each instance of Muḥammad's advice, it may be observed, has been expressed with the help of: hattā which means "until/till/up to/so that...". Used as a conjunction with the imperfect, the phrase expresses the attainment of the utmost limit, in this case the delivery of the child. This, then, would imply that the culprit was legally susceptible to the ḥadd punishment immediately after attaining that utmost limit.<sup>5</sup> Its employment in the subsequent stage - until you suckle the child - could give the impression of providing the advice in special circumstances, such as the welfare of the child. Nevertheless, whichever conclusion one favours, the pericope stands before us as a unit, though it definitely depends either on an earlier but different version, or on a different and mutually exclusive tradition.

Our second source, Bukhārī, does not incorporate the pericope into his compendium in any form, not even as a commentary in the Rubrics, as he usually does, allegedly when he finds such a pericope fails to meet his "standards" of acceptance of the outright authenticity of a

tradition. Insignificant as this may seem, it exhibits a serious problem. The seriousness of this situation lies not so much in the authenticity of the pericope as in the integrity of the Muwatta'. The problem becomes more formidable when we find that Shāfi'ī, a prominent pupil of Mālik who allegedly memorized the Muwatta'<sup>6</sup> and employed its contents on several issues and occasions, has never transmitted, nor implied to have known, the pericope in any way.<sup>7</sup> Here, the observation of Schacht (who, incidentally, never noticed this fact) in his discussion concerning the authenticity of the Muwatta',<sup>8</sup> might be seen to have some sound grounds. This would normally bring us to our third and final source, Trimidhī. However, since my main reason for analyzing Bukhāri's material is his prominent position in Sunnī traditional circles, i.e., second to none but the Qur'ān, the work of his immediate pupil, Muslim, which is considered to be second to none but Bukhāri's, could perhaps be substituted for Bukhāri's for this pericope only.

Mu.C.I.A.

On the authority of Sulaymān b. Burayda from his father:

1. Mā'iz b. Mālik went to the Prophet and said: "O Prophet of God, purify me!" (tahhirnī)
2. The Prophet said: "Woe to you! Go away and ask God's forgiveness and repent to Him!"
3. He went a few yards away and then returned and said to the Prophet: "O Prophet of God, purify me!"



4. The Prophet said to him: "Go away and ask God's forgiveness and repent to him!"
5. He went not far away and then returned to the Prophet and said: "O Prophet of God, purify me!"
6. The Prophet said to him what he had already said before.
7. On the fourth occasion, the Prophet asked him: "What should I purify you from?"
8. "From adultery!" the man replied.
9. The Prophet inquired if the man was sane or not. He was informed that the man was sane.
10. But the Prophet made (further) inquiry as to whether the man was drunk or not.
11. A man stood up and went to smell him, but found no trace of alcohol.
12. The Prophet asked the man: "Have you committed adultery?"
13. "Yes!" the man replied.
14. So the Prophet gave his orders to have the man stoned to death and he was.

15. People (after that) were divided into two groups concerning the man. Some said: "He had destroyed himself and his sin had encompassed his soul" (la qad halaka wa aḥāṭat biḥ khaṭi'atuh).
16. Others (however) said: "There is no repentance (ever to be made) better than that of Mā'iz; he went to the Prophet and put his hand over the hand of the Prophet (i.e., concluding a deal) and said: "Kill me with stones!"
17. A few days later, the Prophet went to them while they were sitting (having a chat). He greeted them and then took his seat. Then he said to them: "Ask forgiveness for your brother Mā'iz b. Mālik."
18. They said: "May God forgive him!"
19. The Prophet said: "He had made such a repentance that if it were to be divided among a community (umma), it would suffice them."

Mu.C.I.B.

- a- Then a woman of Ghāmid, a branch of Azd, came to the Prophet and said: "O Prophet of God, purify me."
- a/b- The Prophet said to her: "Woe to you! Go away and ask God's forgiveness and repent to Him!"

a/c- She said to him: "It seems to me that you want to turn me away as you did Mā'iz b. Mālik!"

a/d- "What do you mean?" the Prophet asked her (wa mā dhāki?).

a/e- "Because I am pregnant as a result of having committed adultery!" she replied.

a/f "Are you?" the Prophet asked (ānti?).

a/g- "Yes!" she replied.

b- The Prophet said: "Go away so that you may deliver what is in your womb!"

b/c- A man of the Anṣār volunteered to look after her till her delivery (fa kafalahā rajulun min al-Anṣār ḥattā waḍa'at).

b/d- Then (later on) the man went to the Prophet and said to him: "The Ghāmidīyya woman has given birth to a child!"

c- The Prophet said: "But we cannot stone her to death and leave her poor infant with no one to suckle him!"

c/d- A man of the Anṣār stood up and (voluntarily) declared: "I will take care of his suckling" (ilayya raḍā'uhu!).

d- Missing.

e- No corresponding element.

f- So the Prophet stoned her to death (fa rajamahā....)

Mu.Ḥudūd.C.5.H.22.

**COMMENT:**

The first thing to note here is that the Story of Mā'iz has now been offered as the introduction to the Story of the Ghāmidīyya. It provides the setting: it serves as a framework for the latter. At the same time, a number of components, explicit or implicit in Mālik's version, have now been verified, expanded or even edited out completely. For instance, element -a- has not only been extended to include six more elements from -a/b- to -a/g-, but element -a- itself has also been expanded. Similarly, element -b- has been provided with -b/b-. The information of -c- with respect to the delivery of the child is the same, but the reporter is different. He is identified as a man of the Anṣār, i.e., a Medinian inhabitant as opposed to the Muhājir (pl. Muhājirūn), a name given to the Meccans who emigrated to Medina.<sup>9</sup> Muḥammad gave his reason for which the culprit could not have been stoned to death: the welfare of the child (still element -c-). Element -d- guarantees the suckling of the child. In Mālik's version, we saw the culprit herself

fulfilling a mother's duty. Here, it is a man of the Anṣar (presumably a different person) who offers to assume responsibility for the child's suckling (i.e., to find a wet-nurse). Element -e- is thus missing, while -f- is the result of the case.

Now, element -a- not only identifies the culprit as a woman of the Ghāmid belonging to the Azd <sup>10</sup> clan, but also clarifies exactly what she had said to Muḥammad at her first appearance: "ṭahhirnī!". <sup>11</sup> Expressed in such a manner, the word could hardly mean anything but a request for purification from a sin which has a fixed penalty. It is the nature of that sin which, had it not later on been stated unequivocally: "I am pregnant as a result of having committed adultery", would have remained a mystery. However, despite the fact that the woman did not at that stage reveal her precise crime, Muḥammad neglected to ask about the nature of the crime. Instead, he advised the woman to go away and repent. Realizing that either he had missed the point, or he had misunderstood her request and intention, the culprit protested by refusing to be treated like Mā'iz - a previous culprit known to both parties. Muḥammad asked her what she meant, and the woman clarified explicitly that she was pregnant as the result of having committed adultery. However, her physical appearance, it would seem, did not support her claim. Muḥammad therefore sought further confirmation of her pregnancy. Without any hesitation, the woman assured him that she was pregnant. Further scrutiny was unnecessary, and her claim to be pregnant was not questioned. To be sure, the woman had no subsequent conversation with Muḥammad, nor did she appear personally before him again. The pericope would thus appear ostensibly to contradict Mālik's version. In a way, it does. Yet a close examination would show that the pericope has been developed in favour of Mālik's version.

Let us for the moment forget all previous versions of the Story of Mā'iz, assume that Muslim's version is the earliest and possibly the only version of the incident, and examine it in its relation to the Story of the Ghāmidīyya. After all, the two pericopes have been juxtaposed. Our first observation is that the two stories have one primary element in common. Both culprits demand to be purified of a sin, and both are turned away with the advice to repent. Similarly, both persist in their demands. Unlike the Ghāmidīyya, however, who was capable of substantiating her request both by referring to a parallel case and by stating that she was pregnant, Mā'iz had no "proof" other than his persistent request to Muḥammad for purification. This persistence led Muḥammad to doubt the man's sanity. Indeed, he even suspected him of being a drunkard.<sup>12</sup> It was this suspicion which prompted the man to appear before Muḥammad on several occasions, quite incidentally four times. Had Muḥammad been certain of the man's sanity, he would most probably have had him punished. The Ghāmidīyya, on the other hand, who was equally aware that a single confession was valid and binding, proved to Muḥammad that she was absolutely sane and hence refused to be doubted on that point. In other words, we are asked to understand the content of the Mā'iz pericope in the light of the Ghāmidīyya pericope, or, conversely, to understand the content of the Ghāmidīyya pericope in the light of the Mā'iz pericope. Either way, the result is the same. For the single, non-legally binding confession of the Ghāmidīyya -i.e., tahhirnī (Mu.C.1.B.-a-) - is no less legally binding than the four-fold, non-legally binding, confession of Mā'iz - i.e., tahhirnī (Mu.C.1.A. - 1.7) --. Similarly, the Ghāmidīyya's explicit confession to adultery (Mu.C.1.B. -a/e) is no more legally binding than Mā'iz's unequivocal acknowledgement of having committed adultery (Mu.C.1.A. 7-8). Juridically, Mā'iz's simple demands to be purified (to be precise, four times) are no different than the similar request made by the Ghāmidīyya

(to be precise, only once). In both cases, what counts in the determination of susceptibility to the hadd punishment is the explicit confession to adultery. The function of both pericopes is to validate the legality of a single confession. In short, the juxtaposition of two different, but not unrelated stories under a single authority - Abū Burayda - appears to me as a highly technical attempt to treat the two incidents as being bound to an identical legal decision on the grounds that the two incidents, from a juridical point of view, are not dissimilar.

It is worth noting here that Muslim is the first Classical author of the so-called Six Canons to transmit the analogically parallel of the story of Mā'iz, as well as to incorporate the guarantor and the sponsor in the story of the Ghāmidīyya.<sup>13</sup> My hypothesis that the juxtaposition of the two stories is a deliberate attempt to interpret the preceding pericope in the light of the succeeding story becomes clearer in the following version of the Ghāmidīyya, which is also juxtaposed, but for an opposite implication, with a different version of Mā'iz.

Mu.C.II.A.

On the authority of 'Abd Allāh b. Burayda from his father:

1. Mā'iz b. Mālik of the Aslam" (tribe) went to the Prophet and said: "I have wronged myself by having committed adultery and I want you to purify me." (ẓalamtu nafsī wa zanaytu fa ṭahhirnī).
2. But the Prophet turned him away.

3. On the following day, he went to the Prophet and said:  
"Prophet of God, I have committed adultery."
4. But he turned him away again (fa raddahu al-thāniya).
5. The Prophet then sent for his family inquiring: "Is there anything wrong with his brain? Do you suspect that he is suffering from anything?"
6. He is absolutely sane! We believe that he is one of the pious people among us", they replied (mā naʿlamuhu illā wafiyy al-ʿaql, min ṣaliḥinā fī mā nurā).
7. On the third day, the man went to the Prophet. But the Prophet sent for his family again.
8. They replied that he was all right.
9. On the fourth occasion, the Prophet dug a ditch for him and then gave his orders to stone him to death. Thus, he was stoned to death.

#### Mu.C.II.B

- a- Then the Ghāmidīyya woman came to him and said: "O Prophet of God, I have committed adultery, so purify me."
- a/b- But the Prophet turned her away (wa annahu raddaha).



a/c- She came back on the following day and said: "Why did you turn me away? Perhaps you have turned me away as you did with Mā'iz. By God, I am pregnant!"

a/d- Missing.

a/e- Missing (but inserted in -a/c-).

a/f Missing.

a/g Missing.

b- The Prophet said: "In that case, go away so that you may deliver your baby" (immā lā fadhhabī hattā taḍa'ī).

b/d- After the delivery she went to the Prophet with a child wrapped in a rag and said: "Here I am, and here is the child to whom I have given birth."

c- The Prophet said: "Go away so that you may suckle him and then wean him."

c/d- Missing.

d- When she finished weaning him, she went to the Prophet with the child, who was holding a piece of bread in his hand, and said: "Here he is. I have weaned him and he eats food now."

e- The Prophet entrusted the child to one of the Muslims and then gave his orders to dig a ditch for her, up to her chest.

- f- Then he ordered people to stone her to death.
- g- Khālīd b. al-Walīd went forward and flung a stone at her head which spurted blood on to his face. As a result, he cursed her.
- h- The Prophet heard his curse to her. Thereupon he said: "Calm yourself Khālīd. By the One in whose Hands rests my soul, she has made such a repentance that even if a tax-collector (sāhib maks) were so to repent, he would have been forgiven!"
- i- He then gave his orders for the funeral prayer and she was buried.

Mu.Hudūd.C.5.H.23

#### COMMENT

Again, a modified version of Mā'iz stands as a framework for the modified story of the Ghāmidīyya. The flow and congruity of the story are very much improved. The narrative technique is excellent. There is a striking balance of direct and indirect discourse; the actual conversation is recorded in direct discourse. All components are supplied with very useful details in the form of verisimilitude. -a-has now, for instance, been extended to include both the confession to adultery and the request for purification (cf. Ma.C.I -a-). Conversely, -a/b- has been shortened to do away with the advice to ask God's forgiveness. As a result, -a/b- now depends on -a-.

Element -a/c- clarifies that the woman made her second appearance on the following day. At the same time, it includes: "I am pregnant" (Mu.C.I.B -a/e-) "Naturally", -a/d-, a/e- and -a/g- are missing. Thus, as much as we can see -a/b- depending on -a-, we can also see -a/c- depending on -a/b-.

The omission of -b/c- necessitates the reconstruction of -b/d-, and in turn exhibits its dependence upon -b-. But -c/d- is missing, probably due to the omission of -b/c-. Element -c- depends on -b/d-, in turn, depends on -c-. Similarly, each subsequent stage is dependent on the immediately preceding element.

In other words, element -a- contains an explicit confession to adultery. Element -a/b- demonstrates that the woman was turned away (confession number one). On the following day, she turns up again, first to protest at having been turned away, and secondly to reinforce her confession for she is pregnant (confession number two). Muḥammad advises her to come back after the delivery of the child; for if she is truly pregnant then the delivery of the child would be the most conclusive evidence. This she does, carrying the newly-born child with her and making a point of providing a statement that the baby is hers (confession number three, with a nice verisimilitude). But again Muḥammad advises her to go away, this time to nurse the child. She does, only to return some time later carrying the child who is already taking solid food, a piece of bread in his hand, and saying: "Here he is, I have weaned him and he eats food now". (confession number four, again with another verisimilitude). This time Muḥammad does not send her away. Rather he seeks a guardian for the child, and then has the woman stoned to death. Thus, whoever is responsible for the pericope seems to be telling us that as a result of four successive confessions to having

conceived illegally by means of adultery, each confession occurring on a different occasion (presumably months apart), the Ghāmidīyya woman was stoned to death after the delivery of her child. Prior to that, Mā'iz b. Mālik of the Aslamī tribe was stoned to death as a result of confessing four times on different days to having committed adultery. The story, however, does not end there. Additional accounts of what happened during and after the infliction of the SP have been provided. I will return to these later. Here I would like first to deal with a structural problem.

In element -b- Muḥammad is made to utter a couplet sentence: immā lā fadhhabī ḥattā taḍa'ī. Arabic lexicographers say that part 1 of the couplet is a compound construction of in and mā plus lā, and that in has been assimilated with mā; hence it is written as immā.<sup>14</sup> The construction then becomes a conditional proposition and hence it is deciphered as: If you do not do that then do this, or do this at least. Nawawī (a Shāfi'ite scholar, and one of the early commentators of Muslim's Compendium, d.676) went even further to provide an appropriately detailed explication of the couplet:

If you refuse to protect yourself and repent to God and retreat from your word, then go away so that you may give birth to your child and be stoned to death after that.<sup>15</sup>

It is worth recalling here that such a construction and interpretation would render the pericope favourable to the validity of a single confession. Granted that the phrase is an original component of element -b-, Nawawī's interpretation is not only hyperbolic - takalluf - but also the context and structure of the pericope do not warrant such an interpretation.

The woman comes forward the next day to protest at having been turned away. She points out that her case is different from that of Mā'iz and hence she should not be treated like him. She is pregnant. There is no reason to doubt her sanity, for if she was telling a lie for the "joy" of being killed, her pregnancy would prove that she had committed adultery. Muḥammad accepts her protest and advises her to go away until the delivery of the claimed child. In this case, the most probable interpretation would be: "If that is the case, then there is no similarity between your case and that of Mā'iz. Go away and come back after the delivery of the child". The dissimilarity in this sense resides in the doubt cast on Mā'iz's sanity.

Nawawi's interpretation could hardly be expected to be otherwise, due to his Shāfi'ite leanings. Yet, it is highly probable that part -1- of the couplet is in fact a deliberately tendentious corruption of the original construction or a later interpolation in order to render the arguments for the necessity of four-fold confession, perpetrated by the pericope, as void. Admittedly, the former, which I would be hesitant to accept, is more hypothetical than the latter. Nevertheless, it is not impossible.

The character of Arabic script makes this highly possible. Let us consider the following mode of expression:

أَمَّا الْآنَ ...

meaning: as for now/in such a case/in that case, etc.

Taking into consideration the kind of protest provided by the woman in the pericope, this mode would not only be both linguistically and semantically appropriate, but would also appear to be a logical response to the objection raised by the culprit. The woman refuses to be treated

like Mā'iz who was turned away on several occasions. She makes the point that she is pregnant. A logical response would be: In that case... or, As for now....., etc., denoting acceptance of a claim which would be substantiated with tangible evidence, i.e., her pregnancy. Assuming that this was the original phrase, its meaning will be: "In that case, go away so that you may deliver your baby". But Arabic script makes this phrase extremely vulnerable to a modification which could change the whole meaning. It involves the omission of alif and nūn of al-'ān and the retention of lā, and hence ammā al-'ān would appear as 'mmā lā. To change the vowel of a into i is even easier. Thus, amma al-'ān would read: imnā lā.

In fact, I was not surprised at all to discover some time later Ibn Ḥazm (d.456) quoting Muslim's version in his own work (al-Muḥallā) where the phrase in question reads: amma al-'ān...<sup>16</sup> It is unlikely that Ibn Ḥazm would change imma lā to amma al-'ān. What is interesting is that Ibn Ḥazm is most certainly quoting the ḥadīth in question from al-Qalānīsī's recension, which was commonly used in North Africa,<sup>17</sup> while the published Ṣaḥīḥ, the vulgate, is the recension of Ibn Sufyān (d.308),<sup>18</sup> commonly known in the East. Thus, it seems to me that the phrase is definitely a later corruption of the original form.<sup>19</sup>

Let us now concentrate on the rest of the pericope. As we have seen, element -e- tells us what happened before the infliction of the SP. The culprit was put into a ditch, deep enough to reach her chest, and was then stoned to death. We may call this a mode of the SP. Elements g-i tell us what happened during and after the infliction of the SP. We see one of the lapidators, Khālīd b. al-Walīd,<sup>20</sup> cursing the sinful woman because some of her blood had splashed on to his face. Consequently, we see Muḥammad rebuking Khālīd for such a remark, on the one hand, and

praising the sinless woman on the other. Similarly, we see Muḥammad providing a parable for the last point. That is, even the tax-collector would have been forgiven had he repented to God in the same way that the Ghāmidīyya had done. The parable itself reveals that to hold such a post in Islam is sinful. To demonstrate that the punished culprit has regained her religious status, Muḥammad offers his highly valued prayer over her dead body. We may refer to this issue as the restoration of religious status of the punished culprit, or tawbat al-maḥdūd. In short, two more issues, which are missing in the earlier version of Muslim, are exhibited in this version: the mode of the SP and the restoration of the religious status of the punished culprit. The former is juridical, and it was a point of disagreement among the Pr. FP jurists. The latter, however, which was prior to the former, is dogmatic and was a controversy primarily raised by the early Khawārij.<sup>21</sup> who pushed their moral strictness to the point of refusing the title of believer to anyone who had committed a mortal sin, such as zinā, and regarding such a person as a murtadd (apostate). The doctrine came to be known as the murtakib al-kabīra - grave/mortal sin.<sup>22</sup>

The doctrine, which expresses a deep moral concern of the Khawārij in general, was extended even further by a sub-sect of the Khawārij - the Azāriqa.<sup>23</sup> For them, the murtakib al-kabīra not only becomes a murtadd, but also can never re-enter the faith (al-īmān) and should be killed for his apostasy, along with his wives and children.<sup>24</sup> This was too much for the Sunnis.<sup>25</sup> While they accept that zinā is a kabīra (grave sin) they do not accept the idea of considering an adulterer or adulteress as an apostate, nor do they accept the Azāriqa's extremism as lawful.<sup>26</sup> For that would entail the creation of a community of saints, which is impossible. To the Sunnis the only grave sinner who becomes a murtadd is someone who abandons Islām,<sup>27</sup> but even then he will not be put to death

unless he refuses to re-enter the Islamic faith.<sup>28</sup> A wide range of hadith literature presenting the Sunni's position came into existence. One of the best examples is the following hadith:

Shāfi'ī said: We were informed by Sufyān b. 'Uyayna from Ibn Shihāb from Abi Idrīs on the authority of 'Ubada b. al-Ṣāmit, who said: "Once we were in a 'meeting' (majlis) with the Prophet of God. He said: 'Pledge allegiance to me that you will never associate God with anything else'. And he recited to them the Verse.<sup>29</sup> 'He who keeps his vows, his reward is from God, and he who happens to commit a crime and thus is punished for it, the punishment is his atonement. And he who happens to commit a crime but is then protected by God (is not discovered), his fate is in the hands of God. If He wishes to forgive him, He will forgive him, and if He wishes to punish him, He will punish him' ". Shāfi'ī said: "I have never heard a better and clearer hadith with respect to the hudūd (fixed penalties) than this one".<sup>30</sup>

Thus, it seems to me, the content of g-i in the Story of the Ghāmidīyya belongs to the same literature dealing with the murtakib al-kabīra with specific reference to zinā. In other words, it is a Sunnī reply to the Khawārij/Azāriqa.

Similarly, the sinfully repulsive nature of the tax-collector (the ṣāhib maks) was expressed in a number of independent hadiths put into the mouth of the Prophet as early as the time of Ibn Ḥanbal. At that time, two Prophetical hadiths came into existence:

إِنَّ صَاحِبَ الْمَكْسِ فِي النَّارِ

"Verily, the tax-collector belongs to the Hellfire."<sup>31</sup>

لَا يَدْخُلُ الْجَنَّةَ صَاحِبُ الْمَكْسِ



"The tax-collector will never enter into Paradise."<sup>32</sup>

By the time of Ibn Maja (d.275), another Prophetical hadith had appeared:

من اعتذر إلى أخيه بمعذرة فلم يقبلها كان عليه  
خطيئة مثل خطيئة صاحب مكس

"He who is apologized to by his brother (a Muslim) but accepts not his excuse will bear the sin similar to that of the tax-collector."

Ja.Adab. C.23.H.1.<sup>33</sup>

Whether or not these hadīths represent the social or economic realities of the third century hijrī, or whether or not the hadīths of tawbat al-maḥdūd are a reaction to the murtakib al-kabīra controversy, these issues are less important for our studies than the fact that none of these traditions has been transmitted by Mālik, either as independent Prophetical traditions, or as part of other traditions such as the story of the Ghāmidīyya and that of Māʿiz. One may go even further and point out that even Mālik's contemporary traditionists, such as Abū Dāwūd al-Ṭayālīsī (d.204)<sup>34</sup> and Ṣanʿānī (d.213),<sup>35</sup> do not appear to have known these traditions, in any form, as Prophetical sayings. Yet, both the Muwaṭṭaʾ and the Mudawwana<sup>36</sup> tell us clearly that Mālik was fully aware of the problem.

Under the Book of Judicial Decisions (Kitāb al Aqdiya), first quoting Sulaimān b. Yasār (a Medinian scholar, d.110)<sup>37</sup> then Ibn Shihāb (d.124)

and finally pointing to the common practice in Medina concerning tawbat al-mahdūd (the repentance of the punished culprit), Mālik concludes by saying: "This is the best of what I have heard".

Muwatta' :Aqdiya.C.3.H.1

Thus, it seems reasonable to suggest that the content of g-i must have come from the literature dealing with the murtakib al-kabīra controversy, and that the ṣāhib maks image must have been borrowed from those independent traditions of the same period. This will take us back to the second topic, which I have called the mode of the SP.

This issue, as I have pointed out, was a matter of disagreement between the early Irāqis and their contemporary Hijāzis. The former held that it is desirable that a culprit for the SP be put in a ditch in order to minimize the pain(!) and, furthermore, it is more suitable for a woman so that she may be protected from the possibility of uncovering her private parts to the public.<sup>38</sup> Similarly, they held that the Imām could perform prayers over the punished culprit, for he (the culprit) had been purified.<sup>39</sup> As we can see, the argument is based on, and derived from, a practical consideration.

The Hijāzis, on the other hand, argued that there is no Sunna to substantiate either point. They totally rejected the idea of digging a ditch on the grounds that not only is no Sunna available for such action, but also there is a Sunna which totally contradicts that notion.<sup>40</sup> They refer to the story of the Jewish couple in which Ibn 'Umar was reported to have remarked: "I saw a Jew leaning over the Jewess protecting her from the stones". Mālik comments: "It is unlikely that the Jew would be able, even if he wanted, to lean over the Jewess if they were in a

ditch".<sup>41</sup> Similarly they rejected the idea that the Imām can perform the prayer. No particular reason was given for this view,<sup>42</sup> but it would appear that the Hijāzis must have thought that his abstention would certainly serve on the one hand, as a lesson for the would-be criminal and, on the other hand, as a public condemnation of such a crime, and at the same time as a public warning that those who are going to be convicted for such a crime would be treated in the same manner.<sup>43</sup> In other words, the rejection of the Imām's prayer is meant to serve as a deterrent. Thus, the ḥadīth in question favours the Irāqis' attitudes on both points: digging a ditch and the prayer of the Imām. This in itself should enforce my argument that the pericope in question was primarily circulated to support the early Irāqis' position. It was developed and juxtaposed with a version of Mā'iz to show that not only it is necessary to confess four times, but it is also necessary to confess on different occasions. Similarly, the combination of these two ḥadīths is meant to show that the issue of digging a ditch for the culprit, male or female, is attested in the Sunna of the Prophet, and that there is no harm in the Imām performing a funeral prayer, for the Prophet had done so for both Mā'iz and the Ghāmidīyya.<sup>44</sup>

Now, if these issues were part of the original story, an explanation for their omission in Ma.C.I and Mu.C.I.B. must be provided. Personally, I have none for the simple reason that Mālik, as we have seen, decided against these issues on the grounds that there was no Sunna to support either claim. Yet he has transmitted both versions: a version of the Aslamī (Mā'iz) and a version of the pregnant woman (the Ghāmidīyya). In neither version does the mode of the SP or the "restoration" of the religious status of the culprit figure as part of the ḥadīth. What we are witnessing here is not a retelling some time later of historical details suppressed in the early versions, but a

realization of ancient problems which had not been solved satisfactorily. The inclusion of these issues in the last juxtaposed versions demonstrates, on the one hand, later attempts to support early Ḥanafite juridical attitudes and, on the other hand, the Ḥanafite contribution to the Sunni position with respect to the murtakib al-kabīra, specifically zinā. Consequently, the inclusion of tawbat al-maḥdūd in the first juxtaposed versions demonstrates a later Mālikite contribution to the controversy of the murtakib al-kabīra, while the lack of the mode of SP there, supports my suggestion that these two versions have been combined in favour of the validity of a single confession.<sup>45</sup> By contrast, the last juxtaposed versions are in favour of the necessity of the four-fold confession and, in addition, that the confessions must be pronounced on different occasions. Someone, somewhere - presumably the student of Muslim<sup>46</sup> who presented the vulgate to us - had corrupted a particular phrase to make the last pair of pericopes favour the single confession. Both juxtaposed versions, however, show that the story of the Ghāmidīyya was developed out of or in reaction to the story of the legendary Mā'iz. Muslim, however, incorporated both pairs under the chapter of confession for adultery.

If we are to believe later Muslim commentators, the author (that is, Muslim) seems to favour the implication of the second pair.<sup>47</sup> This should lead us to our third and final source, Tirmidhī. But one might be surprised to learn that Tirmidhī does not transmit the story of the Ghāmidīyya. Instead, he transmits a different story whose culprit, though described as a pregnant woman, is, nevertheless, identified as the Juhaniyya. The story of the culprit is the subject of our next chapter. Before that, however, I would like to suggest a terminus ante quem for the story of the Ghāmidīyya.

The earliest place where we do find a story in which the culprit is identified as the Ghāmidīyya is in the Kharāj of Abū Yūsuf (d.182). There the pericope is transmitted, but without the isnād, for the mode of the SP. <sup>48</sup>

Thus, the story of the Ghāmidīyya was known to Abū Yūsuf though not in great detail as we have it now. However, we are not sure whether or not the Ghāmidīyya of Abū Yūsuf was pregnant, or even that she was Muslim's Ghāmidīyya. Nevertheless, we are sure that she confessed to adultery, that she was stoned to death in a ditch, and that the Prophet offered his prayer over her corpse. <sup>49</sup>

In contrast, the story of Mālik (d.179), does not reveal the identity of his culprit. We know nothing about her, other than that she was a pregnant woman. Nevertheless, Mālik transmits his pericope with an isnād despite the fact that his isnād is incomplete, ending with Ibn Abī Mulayka. But the existence of this story in the Muwaṭṭa' poses a problem.

Though Shāfi'ī does discuss those issues behind the pericope, nowhere in his works - neither the Risāla nor the Umm - does he quote this ḥadīth. Shaybānī (d.189) however, transmits the pericope of Mālik in his own recension of the Muwaṭṭa'. <sup>50</sup>

In the absence of additional information from various recensions and different manuscripts of the Muwaṭṭa' contrary to the vulgate and Shaybānī's recension, we can assume that at least by 180 AH, the story of the Ghāmidīyya was probably known both in Irāq and in Medina. However, it is difficult to discover the possible inter-influence between these regional stories. Nevertheless, this does not alter my supposition that

the story of the Ghāmidīyya was developed out of and in reaction to the story of the Aslamī - the legendary Mā'iz.<sup>51</sup>

One final point ought to be made. In all these versions of the story of the Ghāmidīyya, nowhere do we find the mentioning of the iḥṣān or the lack of it as the criterion for the SP. On the contrary, the mentioning of the waliyy does raise some genuine questions with respect to the social or marital status of the culprit.

## SYNOPSIS (C)

The main issue behind the Story of the Ghāmidīyya is the stage at which she was stoned to death. Five different stages have been claimed by different versions. The following chart is meant to show at which stage the culprit was stoned to death according to a particular version.

a- Confession → SP (i.e. no mentioning of being pregnant)

Han. vol.4,p.437. Şan. Hudūd: H.13347 (vol.7 p.325)

b- a + giving birth to the child → SP

Han. vol.5, p.42-3; cf.vol.1.p.89. Şan. Hudūd: H.13345

Mu. Hudūd: C.5.H.22.

Dāraq. Hudūd: H.39

Bay. Hudūd: C.5,H.6; C.16,H.3; C.20,H.1.

Shaw. Hudūd: H.1.

Bagh. Hudūd: P.44

c- a- + b- + c- + weaning the child → SP

Han. vol.5,p.348

Mu. Hudūd: C.5,H.23

Daw. Hudūd: C.25,H.3 (4442)

Dāri. Hudūd: 17

Dāraq. Hudūd: H.134

Bay. Hudūd: C.5, H.6

Hak. Hudūd: H.58,59

Bagh. Hudūd: p.45

d- a- + b- + c- + d- + putting the child into custody → SP

Hak. Hudūd: H.57 and 60.

Bay. Hudūd: C.12.H.2, C.20, H.2

cf. Jah. Diyāt: C.36, H.1

e- like d- but omit stage d-

Ma. Hudūd: C.1.H.5

Mu. Hudūd: C.5.H.22.



## CHAPTER IV

### (D) THE STORY OF THE JUHANIYYA

The background of this story is similar to that of the Ghāmidīyya. It is about a woman who goes to Muḥammad and confesses to adultery, substantiating her confession with a claim to be pregnant. Muḥammad calls her guardian and asks him to look after her until she gives birth to the child, and then to bring her back to him. The guardian does as he is asked, whereupon Muḥammad gives orders to have her stoned to death.

The culprit is identified as a woman of the Juḥaynā tribe. However, there is a long and old-established dispute as to whether or not the Juḥaynā is the same woman who, in other ḥadīths, is identified as the Ghāmidīyya. I will deal with this issue later. I here simply want to say that since the following ḥadīths identify the guilty party as a woman of the Juḥaynā, I have decided to call this chapter, The Story of the Juhaniyya.

Now, for reasons unknown the story does not appear either in the Muwaṭṭa', or in Bukhārī's work, the Jāmi'. The only pericope in the Muwaṭṭa', which could be considered a crude version of the Juhaniyya, is the Story of the Pregnant Woman. But as we have seen, this story could also be considered a primitive version of the Ghāmidīyya. For this reason, I will again base my analysis of the Story of the Juhaniyya on Mālik's version, which I have used as the basis for the Story of the Ghāmidīyya. Consequently, for the time being at least, I will assume that the Story of the Ghāmidīyya has never existed, for whether or not Mālik's is in fact the "crude" early version of the Ghāmidīyya or the

Juhaniyya, or even both, is only one among several problems to be dealt with at a later stage. But for the moment, Mālik's version could be used for the basis of our analysis. Having said that, we have to face our second problem concerning the absence of the Juhaniyya's story in Bukhārī. However, for the reason I have given earlier in replacing Bukhārī with Muslim, I will start with Muslim's version, bearing in mind that Mālik's version is the basis of my analysis.

Mu.D.I.

On the authority of ʿImrān b. al-Ḥuṣayn:

- a- A woman of the Juhayna, who was pregnant as a result of adultery, went to the Prophet and said:  
"O Prophet of God, I have transgressed, (aṣabtu ḥaddan) so punish me."
- b- The Prophet summoned<sup>e</sup> her waliyy and said to him:  
"Look after her with kindness and bring her to me after the delivery of the child." He did.
- c- Missing.
- d- Missing.
- e- Missing.
- f- (CF. above: He did)
- g- So the Prophet gave his orders to tie her up in her own clothes, and then gave orders to stone her to death, and she was stoned to death.
- h- Then the Prophet offered his prayer over her dead body.

- i- 'Umar said to him: "Your are offering your prayer for a person who had committed adultery!"
- j- The Prophet replied: "She has made such a repentance that if it were to be divided among seventy people of Medina it would be enough for them. Have you found any repentance better than this, that she had sacrificed her life for Allāh?"

Mu. Hud. C. 5H. 24

**COMMENT**

The pericope is historical in form, but legal in substance. Structurally, it has fewer components than those of Mālik. However, this pericope contains new details and new elements which are missing in Mālik's version. Stylistically, the pericope has been told both in direct and indirect discourse. The setting is identical, or at least recognizable, but the units are either edited out, expanded, or new ones have been introduced. Nevertheless, it still establishes, though not without striking modifications, three juridical points: (a) the validity of confession, unmistakably clarified as a single confession; (b) the specification of time for the hadd punishment - for a pregnant woman - clearly demonstrated as having taken place - almost immediately - after the delivery of the child: and (c) the legality of the SP. But, as can be seen, it does not end there. It goes on to introduce more juridical and moral points. These are: (d) the legality of tying up the culprit, i.e., the mode of the SP, and (e) prophetic example in offering his prayer over the punished culprit, i.e., the restoration of the religious status of the punished culprit. Nevertheless, we know nothing about her marital status.

Element -a- identifies the culprit as a woman of the Juhayna tribe.<sup>1</sup> Furthermore, it clarifies that the adultery and its subsequent result, i.e., unlawful pregnancy, were part of the information provided by the tradent concerning the culprit.<sup>2</sup> Her only confession, which is not explicit from a legal point of view, is: "aṣabtu ḥaddan fa aqimhu ʿalayya".<sup>3</sup> Juridically, this kind of confession is not enough. Its legal accountability, as a confession to adultery, becomes clear only after familiarizing oneself with identical cases.<sup>4</sup> Thus the tradent felt obliged to provide the necessary information so that we may not be left wondering about the nature of the crime. Consequently, we are told indirectly that the pregnancy was obvious to those who were present at the incident.<sup>5</sup>

Element -b- reveals not only that possibility, but also shows how Muḥammad responded. He did not communicate with the culprit, but called for her waliyy, into whose hands the culprit was entrusted. Elements -c- to -e- are understandably missing. We need not be told about the custody of the child; the waliyy should have been responsible for it. However, we are being made aware that we do need to know about what had happened before and after the SP. She was tied up before being stoned to death, element -g-. The Prophet prayed for her after her death, element -h-. ʿUmar protested, element -i-. But Muḥammad justified his action, element -j-. The pericope is constructed in a somewhat cumbersome fashion, bearing remarkable traces of a familiar episode.

To begin with, it is taken for granted that the "audience" knows about both the culprit and the implication of her implicit confession. The summoning of the waliyy explains the omission of three elements, but complicates not only the possibility of the pericope being identical to the story of the Ghāmidīyya, but also puts the status of the culprit in question.<sup>6</sup> It is this last point with which I shall deal first.

The term could linguistically mean: master/proprietor/possessor/owner/relative/patron/guardian/sponsor, etc., etc.<sup>7</sup> Legally, the term is always confined to the legal guardian or trustee. In the cases of minors and first-time marriages, the waliyy is usually understood to be a close male relative: the father, grandfather - both from the paternal side - or germane brother, etc.<sup>8</sup> In other cases, such as our case, a close male relative is not an exclusive right. It could simply mean a master, in which case, as I said, the status of the culprit is in question. Traditionally, the problem would be solved by means of looking at the kind of punishment contained in the pericope. Since the culprit was stoned to death, she must have been a free woman, and in addition to that she must have been a widow or a divorcee.<sup>9</sup> In other words, the waliyy here is a male relative. To postulate otherwise is to abolish the validity of the SP.<sup>10</sup> My tentative assessment is that, if Shāfi'ī knew Malik's pericope, which is doubtful, then this point, among other things could be the reason for not mentioning or alluding to the pericope. Similarly, the summoning of the waliyy and the application of the SP almost immediately after the delivery of the child lead us to understand that the Ghāmidīyya is not the Juhaniyya. Furthermore, the replacement of the protester, Khālīd in the Ghāmidīyya by 'Umar in the Juhaniyya, and the employment of a different image, "ṣahīb maks" in the Ghāmidīyya and "seventy people of Medina" in the Juhaniyya, make it almost certain that the culprits of these two stories are different.<sup>11</sup> Nevertheless, Mālik's story could still be thought of as the basis of both stories. In short, the pericope can be fairly termed a unit, but it is not easy to understand its unitary form without being familiar with a similar story. In other words, our knowledge of Mālik's version, or a similar account, is taken for granted. It is worth noting that the pericope has been incorporated immediately after the last juxtaposed version of the Ghāmidīyya and under the same rubric. This will take us to our third and final source, Tirmidhī.

On the authority of 'Imrān b. al-Ḥuṣayn:

- a- A woman of Juhayna confessed to adultery before the Prophet, and said, "I am pregnant".
- b- Same as Mu.D.I.b.
- c- Missing.
- d- Missing.
- e- Missing.
- f- Same.
- g- Same.
- h- Same.
- i- 'Umar said to him: "You have stoned her and now you are offering your prayer for her!"
- j- Same.

Tirmidhī says: "This ḥadīth is sound and genuine."

Tir.Hudūd.C.9H.1.

COMMENT

What has been said for Mu.D.I. is equally true for this pericope. However, there are a few points to be noted. Element -a-is an improvement on the previous version. There the pregnancy was part of the information provided by the tradent. Here, it is part of the actual confession uttered by the culprit. In both versions, however, the tradent is the same. Thus, in this pericope, -b- now depends directly on

-a- as much as -c- depends on -b-. The protest of 'Umar in would probably reveal that Tir.D.I.e. is an improvement on Mu.D.I.e. was about offering a prayer for an adulteress, but Tir.D.I.e. is about the imposition of the SP on a person, and then offering a prayer. Admittedly, there is little difference, but a close examination Mu.D.I.e. 'Umar's protest in Muslim's version reveals his concern about the status of the punished culprit, while in Tirmidhi's version his concern is more about Muḥammad's action than the status of the punished culprit. In other words, Muslim's version is connected directly with the problem of the restoration of the religious status of the punished culprit, while Tirmidhi's version is much less concerned with that issue than with the question of the executor of the law filling two contradictory roles, the role of the executor and that of the "priest". Thus the problem here is no longer about the restoration of the religious status, but about whether the Imām can perform the funeral prayer for the punished culprit, or not. It seems to me that these improvements show that Tirmidhi's version is later than Muslim's. I have yet to suggest the terminus ante quem for the story of the Juhaniyya. Before that, however, I would like to deal with the question of whether the Juhaniyya is the Ghāmidīyya, or not.

If one inclines to agree with much later traditionists, such as Ibn Ḥajar (d.975)<sup>11</sup> in so far as treating the Juhaniyya's pericope as a separate and independent incident, one could say that provided one is familiar with a similar story, the pericope, as it is, is a unity. But a reason for its later circulation in the ḥadīth works must be provided. I have none to offer. On the other hand, if one tends to incline to the early traditionists - those who transmitted and preserved the pericope - such as Abū Dāwūd<sup>12</sup> - that the pericope describes the same incident reported by Mālik as the Story of the Pregnant Woman, but which later

came to be known as the Story of the Ghāmidīyya, then the pericope before us is certainly a composite. I would be inclined to favour the latter for one simple reason. Whether these stories are separate incidents or not, it is not easy to understand fully the unitary nature of the one without being familiar with the other, as much as it is not easy to understand the juridical implications of the Ghāmidīyya's story without being aware of the Story of Mā'iz. In other words, the contents of these two episodes appear to have been formulated in reaction to or in favour of the content of the Mā'iz story. Unlike the story of the Ghāmidīyya, which was almost certainly produced by different people at different times,<sup>13</sup> the Story of the Juhanīyya was undoubtedly produced by a single person as a reaction to the four-fold confession exhibited in the Story of Mā'iz. Consequently, the Story of the Ghāmidīyya was produced as a counter-reaction to the validity of a singly confession.<sup>14</sup> Both stories, however, owe their existence/emergence to the Story of Mā'iz. Nevertheless, the crude version of Mālik was the prime basis for their forms.<sup>15</sup> The early traditionists, due to their personal and individual inclinations to either doctrine of Confession to Adultery, regarded the two stories as an account of a single incident. The traditionists were less concerned with the internal inconsistencies than with the external means for authenticating the text.<sup>16</sup> Later traditionists, however, had to regard these accounts as historical information concerning two separate incidents which involve two different culprits. Yet, the contents of these two stories make it almost impossible to draw any logical conclusion that they are referring to a single, let alone separate, incident/s.<sup>17</sup> Furthermore, even when one looks at these pericopes and regards them as separate and independent incidents, one can easily discern tendentious elements for juridical interests, and sometimes more conflicting accounts for a supposedly single historical



event. To repeat what I have said, Mālik's crude version is certainly the basis of these two stories, irrespective of their contradictions and inconsistencies. All of them, however, have one thing in common. They tell us that a woman was stoned to death as a result of her confession to adultery before the Prophet.<sup>18</sup> This is the basic unit of the two stories, including the crude account of Mālik. But the Juhaniyya's story seems to antedate the Ghāmidīyya's.

#### TERMINUS ANTE QUEM

In the previous chapter, I suggested that the death of Abū Yūsuf (189) could be taken as a terminus ante quem for the Story of the Ghāmidīyya. I also pointed out there that Abū Yūsuf had no isnād for his version of the Ghāmidīyya, nor had he any details about the story other than that "A woman called the Ghāmidīyya confessed to adultery before the Prophet and that the Prophet stoned her to death in a ditch". That date still stands. I have yet to suggest the terminus ante quem for Mālik's version. Before that, however, I would like to suggest the terminus ante quem for the Story of the Juhaniyya.

The Story of the Juhaniyya appears also in the Kharāj of Abū Yūsuf transmitted directly from Abbān al-ʿAṭṭār (a Baṣran tradent, d. ca.165)<sup>19</sup> going back to ʿImrān b. al-Ḥuṣayn. The same man, that is Abbān, is the common link in all later versions of the Story of the Juhaniyya. So we can fairly assume that the year 165 is perhaps the terminus ante quem for the Story of the Juhaniyya. I may even go so far as to say that this Baṣran tradent is most probably responsible for the story of the Juhaniyya.<sup>20</sup> What about Mālik's version? Mālik, whose isnād is totally different from all later isnāds, be it of the Story of the Ghāmidīyya or of the Juhaniyya, transmits his version directly from

Ya'qūb b. Zaid b. Ṭalḥa (a Medinian tradent, who is reported to have died during the reign of al-Manṣūr, d.158).<sup>21</sup> His isnād, however, is incomplete, stopping at Ibn Abī Mulayka.<sup>22</sup> Thus, Mālik's version could perhaps be dated at around 155 A.H.

It is worth recalling here that in Chapter II I suggested the year 142 A.H. - the death of Mālik's immediate transmitter, Yaḥyā b. Sa'īd al-Anṣārī -as the terminus ante quen for the Story of the Aslamī (Mā'iz)<sup>23</sup> and that the Story of Mā'iz in general was developed out of a crude pericope transmitted by Mālik directly from Ibn Shihāb (d.124).<sup>24</sup> All those dates still stand.

## SYNOPSIS (D)

a- Confession → SP

San. H.13347 (p.325)

Jah. Hudūd: C.9.H.3.

b- a- + giving birth to the child → SP

San. H. 13348 (p.325)

Han. vol.4, p.429; vol.5, p.348

Mu. Hudūd: 5,H.11.

Daw. Hudūd: C.25, H.1.

Jah. Hudūd: 9, H.3

Nas. Janā'iz: C.64, H.1.

Dāri. Hudūd: 17

Tir. Hudūd: C.9, H.1.

Shaw. Hudūd: C.3, H.2.

Dāraq. Hudūd: H.68, 69, 70.

Bay. Hudūd: C.9.H.1; C.15, H.2.

c- a- + b- + suckling the child → SP

Dāraq. Hudūd: H.144.

## CHAPTER V

### (E) THE STORY OF THE HIRED-HAND: THE 'ASĪF

The story concerns a quarrel between two anonymous persons members of whose respective families are reported to have been involved in adultery/fornication. For the sake of clarity, I shall temporarily refer to the antagonists as Mr X and Mr Y. We do not know much about them, nor about the story itself, except that the son of Mr X was employed by Mr Y as a house "boy" ('asīf), and he fornicated with Mrs. Y. Hence Mr X and Mr Y are trying to settle their problem privately by coming to a mutual agreement. Mr X offers Mr Y a hundred sheep and a slave girl, possibly as compensation for ignominy caused by his son to the family of Mr Y, or as a "ransom" to save his son from the death penalty which Mr Y has told him is the punishment for the crime. Mr Y accepts the offer, and the problem is settled. Later, however, Mr X discovers that he has been deceived by Mr Y who has simply tricked him into the agreement: His son is not to be killed, rather he is to be flogged 100 lashes, then banished for a year. Realizing that the life of his son will not be taken after all, Mr X demands the restoration of his settlement, but Mr Y refuses to return it. They quarrel. Mr Y, who is absolutely certain of the validity of their agreement, presumably because it was concluded by mutual consent, goes to Muḥammad to seek his judgement, insisting on being judged in accordance with the Kitāb Allāh. His rival, equally confident of his right to the return of his property, upholds Mr Y's insistence on being judged in accordance with the Book of God. Accordingly, Muḥammad fulfils their wishes.

Juridically, the story has come to be associated with the validity of a single confession for adultery as opposed to the four-fold confession which, as we have seen, is associated with the Story of Mā'iz. I have chosen to call it "The Story of the 'Asīf' which, according to Mālik, means the "hired hand".

Ma.E.1.

On the authority of - Zuhri from - Abū Huraira and Zayd b. Khālīd al-Juhānī:

a- Two men, quarelling between themselves, brought their case to Muḥammad.

One of them said: "O Prophet of God, judge between us in accordance with the Kitāb Allāh!" The other one, who was better informed, said: "Yes, indeed, Prophet of God. Judge between us in accordance with the Kitāb Allāh, and allow me to speak first!"

"Speak up!" the Prophet replied.

b- The man said: "My son was 'asīf to this man. He fornicated with his wife. The man told me that my son would be stoned to death! So, I ransomed him for 100 sheep and a slave girl of mine. Then, I asked the learned men about this. They told me that my son would only be flogged 100 lashes and banished for a year, and that the stoning penalty would be inflicted upon the wife!"

- c- The Prophet said: "By the One in Whose Hands rests my soul, I will judge between you in accordance with the Kitāb Allāh."
- d- Your sheep and the slave girl should be returned to you."
- e- He flogged his son 100 lashes and had him banished for a year.
- f- He then ordered Unays of Aslam (tribe) to go to the wife of the other man and if she confessed, he should stone her to death. She did and he stoned her to death.
- g- Mālik said: "al-asif" means: the hired-hand.

Ma. Hudūd. C.1.H.4 (cf. Bu. Hudūd: 38.H.1; Aymān. C.3.H.5)

#### COMMENT:

The pericope is certainly legal referring to a historical incident. In it, two issues of a legal nature are exhibited: (1) Invalid transaction or illegal possession, and (2) the punishment/s for zinā. I will call them Topic 1 and Topic 2. At first sight, the latter might appear to be an indispensable complement to the former, at least in this particular incident. However, the congruity of the pericope and its subject matter appear to dictate either the interpolation of the latter or vice versa, or the amalgamation of two separate traditions into a single pericope. This is clear not only from its structure, but also from the phrase "Kitāb Allāh", contained in elements -a- and -c-. I will

return to these two points later; here I would like first to analyse the pericope.

Element -a- is an introduction to -b-, which contains the central issue of the pericope: illegal possession. Element -c- is the response to -a-, while -d- is the result of -b- and, at the same time, the fulfilment of -a-. Element -e- deals with the secondary topic: the punishment/s for zinā exhibited in -b-. There we saw a man accusing his own son of "fornication" and at the same time slandering his adversary's wife for adultery in front of the Prophet. Juridically, the man would have been required to substantiate his "allegation" with four witnesses, otherwise he would be liable to 80 lashes for unproved accusations (Q.24:4, cf. Q.24:6 & 23). Nevertheless, elements e-f contain no information for qadhf - the law of false accusation <sup>1</sup>. On the contrary, element -f- exhibits a somewhat peculiar law: pursuing a criminal against God/religion. <sup>2</sup>. In it, one juridical point has clearly been demonstrated. The interrogated woman had confessed to adultery. Thus she was stoned to death. Her partner, nevertheless, was only flogged 100 lashes and banished for a year (element -e-). Nothing, however, has been said concerning him, i.e., whether or not he had admitted guilt, nor was anything said about his social or marital status. Element -g- is a gloss of 'asīf. It could signify either the oddity of the word in question or the novelty of the pericope itself, or most probably both. As it stands, the pericope is a composite. Two issues of a legal nature, which could possibly but not necessarily be connected, have been awkwardly combined into a single pericope whose structural frame and congruent form reject that arrangement.

To begin with, the pericope, as we can observe, has been reported in direct discourse throughout - save for elements -e- and -f-, which

deal with Topic 2. This might indicate the interweaving of two different traditions, or the augmentation of one topic upon the other. Admittedly, we must not be too ready to see different "sources" whenever the narrative structure fails to meet our literary standards; for most of the hadīth narrators were evidently unconcerned with aesthetic considerations. Nevertheless, when such a "literary trait" occurs between two different topics in one given story, together with other clues for the amalgamation or augmentation, the lack of a single origin cannot be ruled out. There are strong reasons to believe that the pericope might possibly have ended at element -d-: "Your sheep and the slave girl should be returned to you." <sup>3</sup>

Nothing more is needed to solve the central dispute which was whether the concluded agreement should be kept or nullified. Neither of the two parties was convinced that his rival was in the right. That that is so is clear from the fact that it was the employer who brought the dispute to Muḥammad and invited him to be arbitrator, applying justice in accordance with the Kitāb Allāh. This demonstrates his total confidence that he was right and that the agreement concluded on mutual consent must be kept. His rival, Mr X, who was equally convinced that he was right, supported the "arrogance" of his antagonist, for his insistence on being judged in accordance with the Kitāb Allāh.

Now, the Kitāb Allāh, which means literally "The Book of God", could be interpreted generally as Scripture, in which case the Qur'ān is of the highest priority. It is unlikely that the two Muslims would bring their dispute to Muḥammad and ask him to judge between them in accordance with the Torah. In other words, the demand of the disputing parties to be judged in accordance with the Kitāb Allāh is the appeal to Quranic



justice. What remains here for us to decide is the issue of the dispute which can be fairly depicted from within the pericope itself.

As we have seen the dispute was brought to Muḥammad by the employer and it was he who demanded justice in accordance with the Kitāb Allāh. Similarly, we saw the father of the ‘asīf supporting his rival's "arrogance". This demonstrates that each party was totally convinced that the other was wrong. The employer was convinced that he had the right to keep Mr X's property on the ground of adoption of contract, while the father of the ‘asīf argued for the nullification of the agreement on the basis of actio rei vindicatio.

This dispute centres on Topic 1. In this case, the most obvious references for the Kitāb Allāh would be the following two Quranic verses: <sup>4</sup>

وَلَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا  
فَرِيقًا مِنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that you may knowingly devour a portion of the property of others wrongfully.

(Q.2:188)

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَنْ  
تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ  
كَانَ بِكُمْ رَحِيمًا .

O you who believe! Squander not your wealth among yourselves  
in vanity, except it be a trade by mutual consent . . . .

(Q.4:29)

The employer was presumably arguing on the basis of the latter text, while the father of the ʿasīf, who ostensibly knew that text but also a more appropriate one, backed up the demand of his rival on the basis of Q.2:188. Hence, the two men demanded to be judged in accordance with the Kitāb Allāh. Their wishes were fulfilled; the case was decided in favour of the father.

The pericope must have ended with element -d-. Elements -e-f- have been added later either as an augmentation from whoever was responsible, whom we might have a chance to identify, or as an excerpt from a different pericope. The two units were then amalgamated to form a single pericope. This was achieved through a simple but clever device.

The transmitter described Mr X as being the more learned of the two: **وكان أنفهمها**. The compliment, which is a deliberately conscious elaboration, is undoubtedly a reference to the "rightful" punishment/s for zinā. It serves two functions: Firstly, it provides a link between Topic 1 - elements a-d- and Topic 2 - elements -e- and -f- - and at the same time, it transforms completely the issue of the case from that of Topic 1 to that of Topic 2. In other words, the punishment for zinā becomes a predominant issue of the pericope. Consequently, if the case is confined to the issue of Topic 2, then Q.2:188 and 4:29 are no longer relevant; for the involvement of either topic, as the central issue of the dispute, will entail the irrelevance of the other for the Kitāb Allāh. Furthermore, interpreting the case as an instance of Topic 2

requires that we identify the reference of the Kitāb Allāh on the one hand and, within that reference, locate the specific text appropriate to the case, on the other.

However, since we have not yet analysed the remaining versions from our two sources, the result of which might help to shed more light on the whole problem, I propose to postpone the discussion of this intricate exercise until later. Before analysing these texts, a few more remarks may be useful.

Despite all the complications, the pericope came to be primarily associated with the validity of a single confession for adultery (as opposed to the four-fold confession, which is generally associated with the story of Mā'iz) and, at the same time, with the legality of the SP for the non-virgin culprits and the flogging plus banishing for a year for the virgin culprits. Mālik has opted for both (i.e., single confession and the two punishments for zinā - adultery and "fornication"). For our assessment, the former will most probably imply that the story of the hired-hand is posterior to, or - to be frank - a reaction to, the legendary Mā'iz, while the latter may tacitly reveal a reaction to the powerful arguments of the anti-SP party. Finally, judging from the intricate and carefully designed structure of the pericope, its construction is due most probably to a single jurist.<sup>5</sup>

Bu.E.1.

On the authority of (Sufyān . . . Zuhri . . .) Abū Huraira and Zayd b. Khālīd al-Juhānī:

- a- While we were sitting with the Prophet, a man stood up and said:

"I beseech you in God's name to judge between us in accordance with (none but) the Kitāb Allāh!"

His rival, who was better informed than himself, stood up and said: "Yes, indeed, Prophet of God! judge between us in accordance with the Kitāb Allāh, and allow me to speak first!"

"Speak up!" the Prophet replied.

- b- The man said: "My son was ʿasīf to this man, and fornicated with his wife, so I ransomed him for 100 sheep and a servant (khādim). Then, I asked the learned men about this, who told me that my son should be flogged 100 lashes and banished for a year, and that the wife should be stoned to death!"
- c- Same.
- d- Same. (but replacing "slave girl" with "servant").
- e- Your son should be flogged 100 lashes and banished for a year.
- f- O Unays! Go to the wife of this man and if she confesses, stone her to death!" She did and he stoned her to death.
- g- Missing.
- h- I said to Sufyān: "Did he not say: 'They informed me that my son should be stoned to death?' Sufyān replied: "I have some doubt about that; it originates probably from Zuhri. That is why I sometimes include it (in the ḥadīth) and sometimes omit it."

Bu. Hudūd. C.30.H.1.

## COMMENT

The setting is different from that of Mālik. Here, a verisimilitude has been provided to give the impression of an eye witness account: "While we were sitting with the Prophet . . ." Again, the invocation is stylistically different:

أُنشِدُكَ بِاللَّهِ إِلَّا مَا قُضِيَ - underlying both the sense of "antiquity" and originality.<sup>6</sup> The narration is in direct disclosure throughout, enforcing the originality on the one hand and correlating a-d and -e- & -f- on the other, as a single congruent pericope. Element -g- is naturally missing. This might give the impression that either the gloss had become commonly known or that the "audience" of Bu.E.1 had no difficulty in understanding the word.<sup>7</sup> Similarly, element -h- exhibits the existence of at least one early version. Either supposition would probably imply the priority of Mālik's version.

Now, as we have noted, element -h- was part of element -b- in Mālik's version. There, it was the employer who had informed the father of the 'asīf about the SP for his son. Here the statement is missing in -b-. The audience, who were already familiar with the story, queried the narrator - Sufyān b. 'Uyayna (d. 198)<sup>8</sup> - about this important statement, which, as far as the audience was concerned, was given by anonymous informers. Sufyān, in all "honesty", gave his reason for not including it in the pericope. He suspects Zuhri as being responsible for its deliberate inclusion, or to say the least he is not sure about its originality.<sup>9</sup> Either of the two leads into a series of fundamental consequences. In the first place, it implies that Sufyan had *heard the pericope from Zuhri either directly or indirectly*. Granted it is the former, the omission of the statement from the pericope, which would not have been included in the form of addendum had it not been the fact that his

audience knew about it, will imply that Sufyan exercised complete freedom to choose what might or might not be part of the original text of the pericope.<sup>10</sup> A similar conclusion will reveal itself if we are to understand that Sufyān did not in fact receive the pericope directly from Zuhri. Both will in turn lead to a more general conclusion: namely, not all which is alleged to have been said was said, nor, conversely, was all that had been said reported. On the contrary, what is alleged to have been said is what has been thought or desired to have been said.

It remains to note that Bukhārī had employed this specific version for the validity of the single confession. In so doing, it must be observed, he is of an opinion similar to that of Mālik or the Medinians in general, as opposed to the opinion of Abū Ḥanīfa or the Irāqīs in general.

My argument is that the phenomenon of the so-called "multiple" isnāds does not, in my opinion, testify to the authority of the so-called common teacher - in this case Zuhri - nor does it provide terminus ante quem for the pericope, in this case the death of Zuhri -124 A.H. . Rather, it is more likely to provide terminus a quo - a date after which the story was probably available. In other words, the generation of Sufyān and Mālik (d.179) and other "immediate transmitters" from Zuhri is more likely to be responsible for the pericope.<sup>11</sup>

It seems to me that Zuhri - if his name must be included - must have heard the pericope as two separate units ascribed to those two different companions: Abū Huraira and Zayd b. Khālīd. He then took the liberty of amalgamating the two units and making them a single pericope. Later transmitters, however, decided what to include in or exclude from Zuhri's account.

On the authority of (Ibn Abī Dhi'b - Zuhri) Abū Huraira and Zayd b. Khālīd al-Juhānī:

- a- A beduin man went to the Prophet, who was sitting, and said to him:  
"O Prophet of God. Judge in accordance with the Kitāb Allāh!"  
His rival stood up and said: "He is right, judge for him in accordance with the Kitāb Allāh!"
- b- My son was ʿasīf to this man, and fornicated with his wife. They informed me that my son would be stoned to death; so I ransomed him for two hundred goats and a slave girl. Then I asked the learned men, who claimed (zaʿamū) that my son should only be flogged 100 lashes and banished for a year."
- c- Same.
- d- Same, as Ma.E.1. -d-.
- e- Same as Bu.E.1. -e-.
- f- And Unays, go to the woman of this man and stone her to death." Unays went and stoned her to death.
- g- No corresponding element.
- h- No corresponding element.

Bu.Ḥudūd.C.34.H.1 (cf.Bu.Ṣulḥ.C.5.H.1)

COMMENT

Like Bu.E.1, the pericope is related in direct discourse. The setting, however, is slightly different. While the verisimilitude is

still preserved, the employer is described as a bedouin, implying crudeness and lack of good manners and proper "education". Trivial as this may seem, the implications have been used by later commentators of the pericope, such as Ibn Hajar, to explain why, in most versions, the transmitter describes the father of the 'asīf as being the more learned of the two. In contrast, his rival is characterised as a cultured man. His modesty, particularly in this version, is clear from the way he employs zaʿmū,<sup>12</sup> ascribing the alleged "rightful" information to the ahl al-ʿilm. It must be noted that such interpretations will not only rule out the possibility of referring to Q.2:29 and subsequently to Q.2:188, but will also help to transform "smoothly" the central issue of the dispute from that of Topic 1 to that of Topic 2. The father's willingness to be judged in accordance with the Kitāb Allāh, in this case, will be purely ironic, for he must have known that the rightful punishment/s would certainly figure in the Kitāb Allāh.<sup>13</sup>

Nevertheless, the pericope is structurally similar to Bu.E.1. The death threat, however, is contained in element -b-. In this case, element -h- will naturally be otiose. The reasons for omitting -g-, which I have suggested in Bu.E.1, will equally be applicable here.

Now as I have pointed out on several occasions, the pericope has been primarily associated with the validity of a single confession for adultery. Here, the proviso which bears that notion is missing. Unays, in element -f-, is simply ordered to go to the wife of the employer and stone her to death - which he does. The question is why this fundamental component is missing. There are two possibilities: Either it was part of the pericope but has been omitted, or it was not originally part of the pericope but was added. To say that it was part of the pericope but was omitted is unacceptable for several reasons. The zinā punishment can



only be applied after conviction which takes place through one of three ways: confession, proved accusation or illegal pregnancy. <sup>14</sup>

The latter is obviously inapplicable to our case. Confession, as we have seen, is missing. We are left therefore with accusation. Yet, juridically, the accusation is incomplete. In such a case, the plaintiff would be required to back up his accusation with three more witnesses; otherwise he would be liable to 80 lashes for false accusation. Again, this is missing. A naive way of getting out of this difficulty would be to say that the incident took place before the establishment of qadhif laws, i.e., the revelation of the Q.24.4. <sup>15</sup> But how then would one explain the inclusion of a single confession in other versions? An even more naive way would be to say that the component was so common that its omission in this version would cause no problem, i.e., it would be understood to have been part of the pericope. This, it must be noted, is the explanation offered by later commentators. <sup>16</sup> It is unacceptable. The implication of the component under discussion came to be the basic instrument for rejecting the demand of four-fold confession. Its omission would certainly cast doubt on its authenticity. Indeed, Sarakhsi (d. 456) raised a similar objection concerning the authenticity of the pericope in general. <sup>17</sup> My argument is that the component was not part of the original construction, nor was the construction of the pericope designed primarily to support the validity of a single confession. The involvement of the single confession, in my opinion, is posterior to the original function of the pericope, i.e., the validity of Flogging plus Banishment on the one hand and the Stoning Penalty on the other. <sup>18</sup> Whether these distinctive punishments were applied simultaneously or not is a problem to be resolved later. Here I want to point out that it appears then that either Bu.E.II is earlier than Ma.E.I or, if not, that the component, "If

she confessed, he should stone her to death," which exhibits the validity of a single confession to adultery, was interpolated by Malik in his version from Zuhri. Later supporters of that doctrine not only confirmed the component but, moreover, rendered it in direct speech attributed to the Prophet. Whether Bu.E.I is earlier or later than both Ma.E.I and Bu.E.II, it is worth noting that Bukhārī's immediate transmitter for Bu.E.II, 'Āsim b. Ali (Irāqī tradent, d.211) <sup>19</sup> relates his version from Ibn Abī Dhi'b (Medinian tradent, d.159). <sup>20</sup> In other words, either Ibn Abī Dhi'b transmitted this version from Zuhri without the confession component, or the component was omitted by 'Āsim in order to refute the validity of single confession.

Bukhārī employs this particular pericope for "the legality of <sup>21</sup> Flogging plus a year's Banishment for virgins." This function, it seems was the original reason for this composite pericope. In other words whoever was first responsible for the augmentation of unit 2, and hence transforming the central issue to that of adultery, must have done so in order to establish the fiqh hadd: Flogging plus Banishment for virgins, and Flogging plus SP for non-virgins. <sup>22</sup> The involvement of single confession was a secondary step. Both juridical issues, however, are treated in unit 2, which is a later augmentation of unit 1.

Not surprisingly, Bukhārī also incorporates this very version in the Book of Sulh, i.e. Settlement, under a rubric which deals with Unaccepted Settlements, i.e. Illegal Settlement. <sup>23</sup> This, it must be noted, is the main issue of unit 1 (elements a-d).

On the authority of Layth . . . Zuhri-) A. Huraira and Zayd b. Khālīd:

- a- A bedouin man went to the Prophet and said: "I beseech you in the name of God to judge for me in accordance with none but the Kitāb Allāh!" His rival, who was more well informed, stood up and said: "Yes, indeed. Judge between us in accordance with the Kitāb Allāh, and allow me to speak first!"  
"Speak up!" the Prophet said to him.
- b- "My son was ʿasīf to this man, and fornicated with his wife. I was told (ukhbirtu) that my son would be stoned to death. So, I ransomed him for 100 sheep and a slave girl. Then I asked the learned men who informed me that my son should only be flogged 100 lashes and banished for a year, and that it is the wife who would be stoned to death.
- c- Same.
- d- Same.
- e- Same as Bu.E.I and II. (direct disclosure)
- f- Same as Bu.E.I (direct disclosure and add:) So, the Prophet gave his orders to stone her to death and she was stoned to death.
- g- No corresponding element.
- h- No corresponding element.

Bu.Shurūṭ.C.9.H.I. (of.Wakāla.C.13.H.1)

## COMMENT

Apart from Bu.E.III which I have indicated was also incorporated verbatim in the Book of Sulh, this is the first version to be incorporated into a section other than the Book of Hudūd. Its setting is a mixture of Bu.E.II and Bu.E.I in that order; beginning with the characterisation of the employer followed by the old form of invocation. Most of the elements are fairly similar, reported in direct discourse. But the first informers, i.e., those who told the 'asīf's father about the death penalty for his son, have now been referred to even more vaguely: ukhbirtu. Similarly, element -f- has been extended to reaffirm the Prophetical orders. Element -g- again is missing, but -h- has been incorporated in its "proper" place in -b-. The version is definitely later than those which we have analysed so far. Bukhārī adduces the pericope in two different places for different functions: Once in the Book of Stipulations -- for the Invalid Stipulations -- and once in the Book of Deputyship - al-Wakāla - for the hudūd.

### Bu.E.IV

On the authority of (Ṣāliḥ . . . Zuhri . . .) A. Huraira and Zayd b. Khālīd al-Juhanī:

a- While we were sitting with the Prophet, a beduin man stood up and said:

'O Prophet of God, judge for me in accordance with the Kitāb Allāh!'

His adversary stood up and said: 'He is right, O Prophet of God, judge for him in accordance with the Kitāb Allāh, and allow me (to speak first!)

'Speak up', the Prophet said to him.

- b- He said: 'My son was 'asīf to this man - asif means a hired-hand - and fornicated with his wife. They told me that my son should be stoned to death. So, I ransomed him for 100 sheep and a slave girl. Then I asked the learned men, who told me that it is the wife who should be stoned to death, and that my son should only be flogged 100 lashes and banished for a year.'
- c- Same.
- d- As for the slave girl and the sheep; they should be returned.
- e- As for your son; he should be flogged 100 lashes and banished for a year.
- f- And as for you Unais, (to a man of Aslam tribe) Go to the wife of this man. If she confesses, stone her to death.' He did, and she confessed, thus he stoned her to death!
- g- Missing (but cf. -b- above)
- h- No corresponding element.

Bu. Akhbār al- Āḥād C.I.H.13

#### COMMENT

The setting is a conglomeration of earlier materials accommodating that of Bu.E.I, II and II, as well as Ma.E.I. The complement, however, as in Bu.E.II --the earliest version -- is missing. 'Asīf is a glossed as : "the hired-hand", making direct contact with or borrowing from Ma.E.I.-g-. Similarly, -h- is included in -b-. Like its predecessors, with the exclusion of Ma.E.I, the pericope has been reported in direct discourse. Two things, however, are worth being noted. First, each of

Muḥammad's decisions is introduced by ammā, thus underlining two things: sequence and subjectivity.<sup>24</sup> It shows that Muḥammad not only dealt first with what was supposed to have been the original dispute brought forward by the employer, but also dealt with other juridical matters far more important than the case of the employer. In other words, the issue of Topic I has been neatly, and in an orderly manner, linked with the issue of Topic 2, and hence the pericope appears to be unitary. As such, the pericope would have been more suitably incorporated into the hudūd section. Whether or not Bukhārī possessed this version before the compilation of the hudūd material is not clear. It is, however, not impossible that the latter was probably the case. On any account, there is a good reason for Bukhari to incorporate this particular version in the āḥād section, i.e., the Validity of an Isolated Report.<sup>25</sup> And this is the second point which merits our attention. As it can be noted, Unays, for the first time, has been identified as: "a man of Aslam tribe." The brackets, supplied by the transmitter, underline the fact that there was but a single "representative." The pericope is definitely later than the previous versions.

To sum up Bu.E.II, it seems to me, is the earliest of all Bukhārī's versions. Its form belongs either to 'Āṣim b. 'Alī or Ibn Abī Dhi'b. If the latter is the case then Bu.E.II is earlier than Ma.E.I. If the former is the case, and I incline to this view, then Ma.E.I is earlier. The component of confession belongs probably to Mālik. 'Āṣim, in this case, had deliberately omitted that particular component to refute Mālik's version. The ascription of this version to Ibn Abī Dhi'b - a highly regarded Medinian transmitter of Zuhri<sup>26</sup> - is a technical device to refute Mālik's component. This will take us to our third and final source, Tirmidhī.

On the authority of (Sufyān . . . Zuhri . . .) Abū Huraira and Zayd

b. Khālīd:

a- While they were sitting with the Prophet, two men quarreling among themselves came to him. One of them stood up and said: 'I beseech you in God's name to judge between us in accordance with the Kitāb Allāh."

His adversary, who was better informed than himself, stood up and said: 'Yes, indeed, Prophet of God, and judge between us in accordance with the Kitāb Allāh, and allow me to speak first!'

'Speak up!' the Prophet replied.

b- The man said: "My son was 'asīf to this man, and fornicated with his wife. So they told me that my son should be stoned to death. I ransomed him my son from him this man for 100 sheep and a servant.

Then I met some learned men who claimed (za'amū) that my son should only be flogged 100 lashes and banished for a year, and that the wife should be stoned to death."

c- Same (Bu.E.I)

d- Same (Bu.E.I)

e- Same (Bu.E.1)

f- Same (Bud.E.1)

g- Missing (Bu.E.1)

Tir. Hudūd. C8.H.1

Tirmidhī says: This ḥadīth is sound and genuine.

## COMMENT

What has been said for Bu.E.I is equally true for this version. However, Sufyan exhibits a more haggadic form than in the Bu.E.1. He also ascribes the information about the SP to the anonymous learned men by using a very modest term: za'amū (they claimed, alleged etc.).<sup>27</sup> Apart from that nothing is needed to be said concerning the pericope. Tirmidhī, however, employs this version for stoning to death the non-virgins: Bāb mā jā' fī al-rajm'alā al-thayyib.

Now, as I have said earlier, the predominance of topic 2 -- SP -- will require the irrelevance of topic 1 for the Kitāb Allāh. Consequently, the involvement of the Kitāb Allāh for topic 2 will require the identification of the Kitāb Allāh, on the one hand, and the location of the specific text, on the other.

There are four alternative interpretations for Kitāb Allāh. It could be a reference to Scripture, or not. In the former case, the reference could be to either the Torah or the Qur'ān. In the latter case, reference would be to either God's decision or the Prophetical Sunna.<sup>28</sup>

However, as I have said earlier, it is unlikely to be a reference to the Torah. Although it is not impossible that two Muslims might bring their dispute to Muḥammad and ask to be judged in accordance with the Kitāb Allāh, i.e., the Torah (cf. JC), it is highly improbable.<sup>29</sup> To begin with, the antagonists are not described as Muslims. Secondly, we have seen that the Story of the Jewish couple was the first incident in which Muḥammad was allegedly involved in the application of the SP for adultery.<sup>30</sup> There we saw that the source of the SP was the Stoning



Verse (SV), so it is not impossible that the person behind the pericope wants us to believe that two people later went to Muhammad and asked him to judge them in accordance with the Kitāb Allāh. In such a case, the father of the 'Asīf would probably have been informed of the appropriate punishment for his son. The person who added unit 2 is likely to have had the Torah in mind. But as I have said earlier, the Story of the 'Asīf deals primarily with Topic 1. Furthermore, the Story of the Jewish couple makes no mention of either Flogging or Banishment. We can therefore, dismiss the possibility of the Torah being the ultimate referent. This leads us to the second proposition, the Qur'ān. When we check the Qur'ān, however, we find mention of no punishment other than Flogging.<sup>31</sup> Where then are we to find the reference? Some later scholars, proposed that the relevant passage was once, in fact, a Quranic verse which was later - for some unknown reason - withdrawn.<sup>32</sup> This was presented as an instance of abrogating the text but retaining the ruling.<sup>33</sup> The relevant passage was identified as: al-Shaikh wa al-shaikha idhā zanayā farjumuhuma al-battata jazā'an bimā kasabā nakālan min Allāh wa Allāh 'Azīzun Ḥakīm.<sup>34</sup> This, as we shall see, was originally Umar's maxim, which he did not dare include in the Book of God for fear that someone would accuse him of adding something to the Book of God - something which had not originally been included. Those who borrowed the maxim, presumably under pressure from the anti-SP Party, had only to add something to make the maxim Quranic. In fact, the last sentence which reads: jazā'an bimā kasabā . . . is an excerpt from Q.5:38 which reads:

السارق والسارقة فاقطعوا أيديهما جزاءً بما كسبا نكالا  
من الله والله عزيز حكيم

As for the thief, both male and female, cut off their hands as a "reward" for their deeds, an exemplary punishment from God. God is Mighty, Wise.

Thus, we hardly need to point out that a particular Quranic verse has been excerpted and attached to 'Umar's maxim to make it a complete Quranic verse. This leads us to consideration of the remaining alternatives.

Let us assume that the reference there is to the Sunna of the Prophet. In this case, the reference could be to any one of the preceding Stories, including the Story of the Jewish couple or Mā'iz. Or, to put it more vaguely, it would be a reference to a well-known incident in which Muḥammad is known to have given a similar decision. But, as we have seen, in not one of those stories was Flogging plus Banishment discussed or even implied. So, if the Kitāb Allāh is a reference to one of those stories it must be a reference to a pericope which does mention Flogging and Banishment as part of the punishment. The only story which does mention this kind of penalty is the Story of 'Ubāda. (see below chap. VII) But, as I will show later, the Story of 'Ubāda was the last pericope to appear. In contrast, the Story of the 'Asīf was transmitted by Mālik, who knew nothing about the Story of 'Ubāda. Once again, we dismiss the story of 'Ubāda as being the reference. We would reach an almost similar conclusion, were we to assume that the Kitāb Allāh is a reference to God's decision. For the understanding of God's decisions necessitates going back to Muḥammad -- the Prophet. Nevertheless, this assumption is the one most favoured by Muslim scholars, today as well as in the past, and as far as they are concerned the problem has been settled.<sup>35</sup> For me, however, not one of the references is substantiated by the composition of the ḥadīth material. The Kitāb Allāh refers instead to 'Umar's maxim, the maxim

which was later considered to have been in the Qur'ān. In other words, the amalgamation of the Unit 1 - which was an independant pericope whose "Kitāb Allāh" was a reference to Q.2:188 and 4:29 - and the Unit 2 - which was presumably also an independent tradition - was concluded after the circulation of the Story of 'Umar - which was produced by a jurist, presumably Zuhri himself (d.124) in support of the legality of the SP.

Mentioning that "SP is a just claim in the Kitāb Allāh" in the Story of 'Umar provided the ideal justification for the adoption of Unit 1 and the subsequent addition of Unit 2, hence for transforming the central topic from that of illegal possession of property to that of the hadd punishment for adultery and fornication. Still later, the component of a single confession was added. This last addition was made by one of the succeeding generation to Zuhri, possibly Mālik. Hence we arrive at the Story of 'Umar, which is the subject of the following chapter.

## SYNOPSIS (E)

The following chart is meant to demonstrate those who transmitted Unit 1 and 2 as one pericope and those who transmitted Unit 2 as a separate pericope.

### Unit 1 and 2

Ma. Hudūd: C.1, H.4.

San. H.13309-10

Han. vol.4, p.p. 115 and 116

Bu. Sulḥ: C.5, H.1; Aḥkām: C.39, H.1; Āḥād: C.1, H.13;

Shurūṭ: C.9, H.1; Aymān: C.3, H.5; Hudūd: C.30, H.1;  
C.34, H.1; C.38, H.1; and C.46, H.1.

Mu. Hudūd: C.5, H.12.

Daw. Hudūd: C.25, H.6 (4445, vol.4, p.591)

Jah. Hudūd: C.7, H.1.

Tir. Hudūd: C.8, H.1.

Nas. Quḍāt: C.21, H.1 and 2.

Dār. Hudūd: C.12 and C.19

Bay. Hudūd: C.4, H.1 and 4; C.5, H.2 and 2; C.10, H.4; C.13, H.2  
and C.15, H.1.

Unit 2 alone

Han. vol.2, p.453

Bu. Shahādāt: C.8, H.2.

Hudūd: C.32, H.1 and 2.

Wakāla: C.13, H.1.

Bay. Hudūd: C.13, H.4 and 5.

Bagh. Maṣābīh, Hudūd, vol.2, p.44.

Shaw. Hudūd: C.1, H.2.

cf. Bu. Āḥād: C.1, H.12 (where Bukhārī transmits Unit 1 alone)

## CHAPTER VI

### (F) THE STORY OF ʿUMAR

Our next pericope concerns a general statement made by ʿUmar b. Khaṭṭāb, the second Caliph of the Muslim community, regarding the SP.

The pericope is primarily concerned with the origin and the source of the SP for zinā and hence with its legality as a purely Islamic punishment. At the same time, it lays down the legal procedures by which the culprits of zinā can be convicted.

The story itself has come down to us in various forms: sometimes as a general statement and sometimes, as a public speech given on a particular occasion and for a particular reason/s. Similarly, the source of the SP is sometimes claimed to be the Stoning Verse (SV), sometimes Prophetical practice (the Sunna). At other times, it is claimed to derive from God's decision or from both the SV and the Sunna. Irrespective of the ultimate source, all these accounts are attributed to ʿUmar, and hence I have chosen to call it: the Story of ʿUmar. It appears as follows in our three sources, beginning with Mālik:

#### Ma.F.I.

On the authority of Ibn ʿAbbās:

I have heard ʿUmar b. Khaṭṭāb saying:

"The Stoning Penalty is a just claim in the Book of God for (those) who fornicated - men and women, who have attained

the status of iḥṣān - when there is proof, or pregnancy, or confession."

Ma. Hudūd. C.1.H.8.

COMMENT

This is the first pericope which is neither prophetic nor historical. It is simply an important statement ascribed to 'Umar, the second Caliph of the Prophet. Within it, two important issues are apparent: the attestation of the SP, claimed to be present in the Book of God [sic], and the declaration of the Code of Conviction. That the former is "dogmatic" is not only detectable from its polemic tone, but is also well established in both literary and historical works. The latter, that is the declaration of the Code of Conviction, is juridical. As such, the pericope could perhaps be described as legislative in structure and form, but dogmatic in theme. Legislative because, while it is not based on the locus probans principle, it still deals with legal procedures. It contains three topics closely related in terms of both order and importance. The source of the SP is clearly claimed to be "revelation". Similarly, the pericope identifies the convict and, finally, lays down the Act of Conviction, or the Code of Conviction. Structurally, the pericope is concise and exact; the three topics are neatly juxtaposed to form a cohesive unit.

One point ought to be noted. The tradent Ibn 'Abbās, appears as an eye-witness of the report. The pericope leaves no doubt whatsoever that Ibn 'Abbās had heard the report personally from 'Umar. <sup>1</sup>

Taken at face value, the language of this pericope appears to be simple and straightforward. However, when one looks into the discussions of the three topics, from the point of view of both their polemical and historical relevance to the pericope, there emerges a different picture. What is to be understood by the "Book of God"? <sup>2</sup> What is/are the meaning/s of iḥṣān? <sup>3</sup> How, when, or even which of the grounds for conviction is applicable? <sup>4</sup> To attempt to answer these questions without the summation of other versions of the same pericope would be simply to render a conjectural reading. In other words, a sound assessment of the simplicity or complexity of the language of the pericope can be achieved only after examination and analysis of other versions. I also draw attention to the pertinent chapters in the ikhtilāf section. <sup>5</sup>

Now, before undertaking examination of the other versions, I would like to make some minor observations. Stylistically, the pericope is fashioned in highly technical legal parlance which would have been much less familiar to ʿUmar and his associates than to the jurists proper, who flourished from the second century of the Hijra reaching their peak during the last days of Shāfiʿī. The unitary nature of the pericope also suggests that it was formulated later than is normally assumed, and for juridical reasons.

Now, Mālik has another pericope, which is also known as the story of ʿUmar.



On the authority of Ibn Musayyib:

- a- As 'Umar b. Khaṭṭāb left Minā, he halted for a rest at the Abtah valley and piled up a heap of pebbles on the ground, threw his cloak/robe onto it and lay down on his back. He then stretched his hands up towards the sky and said: "O Lord! I have aged and my strength has diminished, and my subjects have dispersed. So, let me die as neither negligent or prodigal". Then he proceeded to Medina where he delivered a public speech saying:
- b- "O people! Several traditional practices (al-sunan) have been enjoined upon you and many obligations (al-farā'id) have been ordained to you; thus you have been left on the clear road (in no uncertainty) unless you go astray with the people to the left or to the right."
- c- He then clapped one of his hands against the other and said:
- d- "Beware lest you destroy yourselves go astray in respect of the Stoning Verse on the account of a person who says: 'We do not find two penalties in the Book of God', for the Prophet has stoned and so have we.
- e- By the One in Whose hands lies my soul, if it were not that people would say: 'Umar has added something in the Book of God', I would have written it:  
'The Shaikh and the Shaikha: stone them outright', for we have recited it!"
- f- Ibn Musayyib said: "No sooner had the month of Dhul-qa'da passed then 'Umar was assassinated, may God rest his soul!"

f.a- Yaḥyā said: "I heard Mālik saying: . 'al-Shaikh wa al-Shaikha means: non-virgin men and women, stone them outright."

Ma. Hudūd.C.I.H.40

#### COMMENT

This pericope deals with one issue only: the source of the Stoning Penalty. The issue is dogmatic. Historical in both form and structure, the pericope is presented as a narrative which opens with a completely unrelated setting. In no way is element -b- dependent for its contextual reading on element -a-, which compromises an entirely separate unit or an introduction to a different story. A narrative embellishment is provided by element -c-, whose main function is presumably to express 'Umar's concern over a matter with which he has been preoccupied for some time, waiting only for an appropriate opportunity to express it publicly. Element -c-, then, serves as a link between -b- and -d-, without which link these two elements would lose their cohesive quality. Element -e-, in turn, depends on -d-, although - strangely enough - one component of -e- contradicts part of -d-: " .... for we have recited it", in -e- is not at all in harmony with "We do not find two penalties in the Book of God" of element -d-. But I will return to this issue later.

Element -f- compromises a personal contribution from Ibn Musayyib, the aim of which is to provide a terminus ante quem for the pericope. Similarly, -f.a- does not really form a coherent part of the pericope, but merely serves as a gloss. 'Umar's words suggest that age is the criterion for susceptibility to the SP. Mālik, however, points to marital status as the criterion. He employs, not the muḥṣan and muḥṣana terminology, but rather the terms of thayyib and thayyiba to interpret the shaikh and shaikha.<sup>6</sup>

Ibn Musayyib, the tradent, does not give the impression that he personally received or heard the pericope from 'Umar.<sup>7</sup> He seems merely to be giving an account of a story ascribed to 'Umar. Whatever the case, it is almost certain that the story was related primarily for the implication of elements -d- and -e-, while element -f- serves as terminus ante quem, the establishment of the date prior to which the pericope was uttered.

As stated above, element -a- remains unrelated to the rest of the pericope. Neither does it improve the pericope as a whole, nor does it explain any point within it. In fact, there is very little, if any, justification for its inclusion. The only possible reasons for its inclusion are probably the indication that 'Umar's speech was delivered publicly in Medina, the home of Muḥammad's Companions and his Sunna, and the use of the "pebbles" as a symbolic reference to the stones which are the means of carrying out the SP.

Element -b- provides the real introduction to the main body of the pericope. It reminds the audience that they are subject to two types of laws - laws which have been imposed through custom: sunan, and laws which have been ordained upon them: farā'id. Both constitute obligations. Element -b- also exhibits why these laws have been enacted. However, the construction is somewhat cumbersome. The sentence which reads: " .... illā an taḍillū ..." presents a problem. "Laws have been imposed upon you and that you have been left in no uncertainty unless you go astray ...."(!) It is unlikely. It does not follow the argument; what has been clearly set out could not lead people astray. The most likely construction is ..... 'alā an lā taḍillū bil-nās yamīnan wa shimālan .....<sup>8</sup> - "Verily, so that you may not go astray with people, left or right". Ibn 'Abdūbarr, who transmits Yaḥya's version from

Mālik, presents the sentence as follows: 'alā an taḍillū .... "...so that you may go astray", which, in fact, adds insult to injury.<sup>9</sup> Shāfi'ī, a contemporary of Shaybānī, and another prominent student of Mālik, completely ignores this awkward construction, just as he completely omits element -a-.<sup>10</sup> Whoever is right, Yaḥya's version poses a problem for which I see no possible answer other than to suggest that this is an error, due either to scribes or transmitters, which was subsequently left untouched for the sake of accuracy and originality, and despite its erroneous origin, is provided with a correct interpretation.

Element -c- is parenthetical, providing verisimilitude on the one hand, and expressing regret and remorse and/or drawing attention to what he was about to say, on the other. These last two possibilities are significant. Zurqānī preferred to view element -c- as an indication of 'Umar's regret that in spite of this clarity people will still go astray and deny certain things, such as SP.<sup>11</sup> This regret is taken as part of 'Umar's insight or vision, much celebrated in the hadīth literature and Muslim history.<sup>12</sup> As such, the warning about the opposition to the SP exhibits 'Umar's prolepsis: an anticipation of the unknown but, nevertheless, expected. The reference here is to the SP.<sup>13</sup> Alternatively, the action, that is the content of element -c-, could simply have meant that 'Umar wanted to draw his listeners' attention to the current problem - opposition to the SP - about which he was going to give his opinion.<sup>14</sup> This, then would imply that opposition to the SP was already known during the time of 'Umar, and that the entire pericope was designed to quell the dispute.<sup>15</sup>

Several, but trivial, probabilities have been offered by different commentators.<sup>16</sup> We will see later, how only the above two

interpretations were accommodated in the pericope, and why the proleptic function gained the upper hand.


Element -d- provides the actual warning. It informs us that the opposition, hypothetical or practical, concerns the absence of two penalties in the Book of God.<sup>17</sup> But 'Umar rebuffs the opposition by claiming that the Stoning Penalty is derived from Muḥammad's practice, and hence from the Sunna.<sup>18</sup> Consequently, it entails that the objection is to the lack of the Stoning Penalty in the Book of God,<sup>19</sup> which in this context could refer only to the Qur'ān.<sup>20</sup> For not only does SP merit no mention whatsoever in our texts of the Qur'ān, but it is also totally incompatible with the penalty that is mentioned: al-zāniyatu wa al-zānī fajlidū kulla wāḥidin minhumā mi'ata jalda (The adulteress and the adulterer, flog each one of them one hundred lashes) (Q:24.2).<sup>21</sup> There are two obvious reasons for understanding the words "The Book of God" as a reference to the Qur'ān. First, 'Umar acknowledges that the SP receives no mention in the Book of God. He adduces his proof for the legality of the SP from the practice of the Prophet: fa qad rajama rasūlu Allāh wa rajamnā ba'dah. Thus, as far as he is concerned, the source of the SP is the Prophetical Sunna. Secondly, he expresses his reluctance about the incorporation of a formula - al-shaikh wa al-shaikhā farjumūhumā al-battata - into the Book of God for two obvious reasons: 1) he would be accused of having added something to the Book of God - something which has never been part of it but, nevertheless, was commonly known, and 2) the formula was commonly known, not as part of the revelation but as a "maxim".<sup>22</sup> In other words, it is not something which 'Umar or anyone else could claim that he had heard from the Prophet and was hence part of revelation. Rather, it was a popular statement generally accepted as a maxim, but never approved of as "Revelation". There is no reason necessitating that "āya" and the root "q-r-" should


be understood as meaning "verse" and "to read", respectively.<sup>23</sup> They could simply mean: "sign/token/wonder/mark/miracle/marvel/model/exemplar/paragon ....."<sup>24</sup> To give but a few examples: in Q.2.:211, 248, 3:41; and 16:10 they are always understood to mean "sign". Similarly, the root q-r- does not necessarily mean to "to read" or "to recite" alone. It could denote "relate" (cf. Q.17:106), "repeat", "rehearse", "recapitulate" (Cf.Q.75:18), or simply, "recite", "declare", etc. Thus, not only is it logical to exclude the meaning of "scriptural verse" from the word āya and "to read or peruse" from the word qara'nāhā, but it is also unavoidable, as the pericope itself would appear to suggest. Burton puts it well:

‘Umar is supposed to have been afraid of being accused of adding to the Book of God. One would not employ the term 'adding' when speaking of what is recognised as authentically Quranic. Stoning was, in ‘Umar's view, an attested Sunna, and hence an essential Islamic ruling ... Had it been Qur'ān, ‘Umar would have recorded it without heed to what might be said ....<sup>25</sup>

In other words, what ‘Umar was afraid of, and could not dare to do, was to record in the Qur'ān something that was not Qur'ān. Moreover, he does not give the impression that what he had wished to record in the Book of God was a Prophetical Statement and hence of revealed status. It was a "maxim" which he would very much have liked to record in the Book of God, but did not dare. It seems to me that if ‘Umar was in any sense involved with this problematic issue, then elements -d- and -e- of Mālik's version could be regarded as a "true" version of his involvement. The remaining elements were added later for different reasons.<sup>26</sup> What

is important now is to determine the motives of those elements and to trace their origins.

Assuming that elements -d- and -e- stand as a unit, then -a + c- and -f- are not original elements in this pericope. I have already pointed out that element -a- is gratuitous. Not only has no one other than Ibn Musayyib ever transmitted it as part of the pericope, but also it plays no important part in the pericope itself. It is there as verisimilitude, or as a symbolic device for the SP. Similarly, element -b- has never been transmitted by anyone but Ibn Musayyib. Whether or not he was responsible for its origin is not clear. One thing is clear, however - at least to me. Element -b- contains two key sentences highly appropriate to elements -d- and -e-: gad sunnat lakum al-sunan was furidat 'alaykum al-farā'id two distinct sources of Law - laws which have been introduced through custom and practice, and laws which have been imposed or ordained through decrees. Both constitute obligation and duty. This is an appropriate introduction to : 

 showing that the SP belongs to the former category, the Sunna. Yet, despite its extraordinary role, no one but Ibn Musayyib was interested in incorporating it into the pericope. What we are witnessing here is the earliest attempt to justify the legality of the SP as prophetic Sunna. Once the issue was entangled with "scripture", Kitāb Allāh, and yet could not be found there, it was possible or desirable either to dispense with element -b- completely, or to replace it with a more suitable introduction, as we shall see later. In fact, it appears to me that the construction of element -b- depends heavily on a number of allegedly Prophetic Traditions subsumed under al-nahy bi al-qawl bi al-qadar". Among them is "I have left you with two things, you will never go astray as long as you cling to them: The Book of God and the Sunna of His

Prophet".<sup>27</sup> Not insignificantly, this pericope does appear in the Muwatta' in the Book of Qadar. Thus, the pattern was available, and to borrow it for polemic ends was a useful and rewarding practice.

Element -f- has undoubtedly been supplied as a constructive terminus ante quem. Its function is to demonstrate the perpetuity of the SP.<sup>28</sup> Element -f.a-, which is a gloss of shaikh and shaikha, is hardly necessary. It does reveal, however, that Mālik was aware of the Qur'ān and Fiqh conflict.<sup>29</sup> Without making reference to the former, he solves the problem by resorting to juridical explanation. Thus, al-zāniyat wal-zānī, means non-virgins, men and women.<sup>30</sup> The former fall under the Flogging Penalty according to the Qur'ān 24:2. The latter fall under the SP according to the Sunna of the Prophet. In short, the pericope is composite. Only -d- and -e- could stand as a unit. The rest are complementary. At this stage it would perhaps be wise to look at Bukhari, our second source, and see how he received these two pericopes.

Like Mālik, Bukhārī transmits both pericopes, but under different rubrics. Under the Bāb al-i'tirāf bi al-zinā (a chapter concerning confession to adultery), comes the following pericope:

Bu.F.I.

On the authority of Ibn 'Abbās:

a-b- Missing

b.b- 'Umar said: "I fear that with the passage of time someone might say: 'We do not find the SP in the Book of God!' Thus, people will go astray by abandoning an obligation (farīdatan) which has been revealed by God".



c-f Missing

g- "Verily, the Stoning Penalty is a just claim against a fornicator who has acquired the status of iḥṣan when there is proof, pregnancy or confession" (cf. Ma.F.I.a).

h- Sufyān said: "I have memorized it as follows:

'Verily, the Prophet had stoned and so did we'".

Bu.Ḥudūd.C.30.H.2.

#### COMMENT

What has been said for Mālik's first pericope is equally true for this one. However, a few dramatic changes have now taken place. To begin with, the phrase "The Book of God", has now been shifted from its formal position in Mālik's pericope and proliferated as a new element, which I have marked as -b.b-. Furthermore, it has been surrounded with a new semantic "effect": anzalaha Allāh, which explicitly claims that the SP is of revealed status: ... fa yaḍillū bi tark farīḍatin anzalaha Allāh. The source of the SP is now certainly "Revelation". However, the same element acknowledges that the SP will not be found in the Book of God, but, that, nevertheless, people should not be misled by that fact; for it has been generally accepted - up to and including the era of 'Umar - that it was sent down by God as his revelation. The pericope is clearly an anticipation of the opposition to the SP. The absence of the SP from the Book of God has been honestly admitted. However, its legality has been merely claimed but not proven or demonstrated. It was Sufyān (d.198) who, perhaps aware of the problem, provided a solution in element -h-. The SP is a prophetical Sunna.<sup>31</sup> That is how he remembers

having received the pericope. <sup>32</sup> It seems to me that element -b.b- shows a blatant but crude attempt to exploit an uṣūlī principle, namely naskh al-tilāwa dūn al-ḥukm <sup>33</sup> (an instance of abrogation of a text, but not the ruling itself), Sufyān's addendum represents those who insisted that the source of the SP was the Sunna and not the Qurʾān. The addendum, it seems to me, is part of -b.b- Thus -b.b- and -h- form one unit. Element -g- is the actual pericope of Mālik - Ma.F.I.a. Thus, Mālik's stratum has been excerpted and "woven into" new surroundings in order to elevate ʿUmar's maxim, and hence the SP, to a revealed status. The text, however, is not to be found in the Scripture. Nevertheless, the penalty is still operative (i.e. mansūkh tilāwatun lā ḥukman). The pericope is obviously composite.

One thing remains to be noted here. Bukhārī has incorporated the pericope not under the Rajm - SP - but under "Self-confession" for adultery. He was in a position to do so because, for the source of the SP, he knew a more appropriate pericope.

Under: Bāb rajm al-ḥublā min al-zinā idhā aḥsanat: K.Ḥudūd.C.31.

#### Bu.F.II

On the authority of Ibn ʿAbbās:

#### Part I

"I used to teach/read to a number of Muḥajirun (emigrants) among whom was ʿAbd al-Raḥmān b. ʿAwf. One day, while I was in his house at Minā, and he was with ʿUmar b. Khaṭṭāb during the last pilgrimage he made to Mecca he (Ibn ʿAwf) came to me and said: 'I wish you had been present today when a man came to the Commander of the faithful and said: "O Commander of the faithful! Have you heard so-and-so who said: 'Had ʿUmar been dead, I would have paid my allegiance to so-and-so; for by God, the election of Abū Bakr was nothing but a sudden action, quickly settled!'"

‘Umar became angry and said: ‘By God, I am going to give a public speech tonight, warning people about those who want to rob them in their affairs’. So I said to him: ‘Do not do that! The Hajj festival attracts riffraff and mobs (hooligans), and these are the very people who will be near you when you talk to the crowd. It is quite possible that you may say something which can be grossly misinterpreted and wrongly transmitted on your behalf. Wait until you reach the abode of Hijra and the Sunna. There you will be surrounded by jurists and nobles, who will understand you perfectly and spread your word accordingly’. So ‘Umar said: ‘By God, I will do that first thing in Medina’.

Ibn‘Abbās said: "So ‘Umar arrived in Medina towards the end of the month of Dhul-ḥijja. When it was Friday, we hurried to the Mosque at about mid-day. In the mosque, near the corner of the pulpit, I found Sa‘īd b. Zayd b. ‘Amr b. Nufayl sitting. So I sat near him, my knees touching his. It was not long before we saw ‘Umar coming. I said to Sa‘īd: ‘He is going to say something today which he has never said since he was elected’. Sa‘īd did not like that, so he said: ‘What new thing can he say which he has never said before?’ ‘Umar climbed into the pulpit and sat there. When the mu‘adhdhins stopped, he stood up, praised God and then said:

## Part II

‘Now then, I am going to say something which I have been destined to say. I do not know why, but perhaps it is a signal that my last days are near. Therefore, whoever is sure of being able to understand it and remember it, let him transmit it as far as his best can take him. But he who is not sure of himself, let it be known that I do not permit anybody to tell lies on my behalf.

### Part III

- a- God has sent Muḥammad with the Truth. He revealed to him the Book. Among what God has revealed is the Stoning Verse. We have read it, we have understood it and we have memorized it. The Prophet had stoned and so did we after him. (Cf. Ma.F.II, -d-, and Bu.F.I, -g-).
- b- I fear that with the passage of time, someone might say: 'By God, we do not find the Stoning Verse in the Book of God'. Hence, people will go astray by abandoning an obligation which has been revealed by God.
- c- Stoning Penalty in the Book of God is a just claim against a fornicator who has attained the status of iḥsān, be it a man or a woman, when there is proof, pregnancy, or confession.

### Part IV

Furthermore, we used to recite from the Book of God: 'Do not disassociate yourselves from your fathers; for it is disbelief to disassociate oneself from one's father'. Or, 'It is disbelief for you to disassociate yourselves from your fathers'.

لا ترغبوا عن آبائكم فإنه كفر بكم أن ترغبوا عن آبائكم . أو إن كفرًا بكم أن  
تتبعوا عن آبائكم ...

### Part V

Verily, let it be known that the Prophet had said: 'Do not over-praise me as Isa, son of Maryam (Jesus), was over-praised. Only say: The servant of God and His prophet'.

لا تطروني كما أطرى عيسى ابن مريم وقولوا عبد الله ورسوله ...

## Part VI

It has come to my knowledge that someone among you has said: 'Had 'Umar been dead, I would have paid my allegiance to such-and-such a person'. Let no-one be misled by saying: 'Abū Bakr's election was a sudden action, quickly settled'. True, it was like that. But God has prevented the evil outcome. Indeed, no one among you is comparable to Abū Bakr! .....

[Then the pericope goes on to talk in great length about what had happened after the death of the Prophet and how Abū Bakr was eventually elected after a short disagreement between the Anṣārīs -the Medinians - and the Muḥājirun -the Meccans. A few names from both sides are also singled out for their obvious stubbornness in complying with the new choice of the Khālifa. Among them are 'Alī - the fourth Khālifa - Zubair b. 'Awwām, whose son later during the era of the Umayyads, proclaimed himself as Khālifa in Ḥijāz, and finally Sa'd b. 'Ubāda, who was the choice of the Anṣārī as their Khālifa.<sup>34</sup> The episode came to be known as the story of the Saqīfa.<sup>35</sup> It occupies at least 32 lines in Bukhārī.]<sup>36</sup>

Bu.Hudūd.C.31.H.1.

### COMMENT

As can be seen, the pericope deals with extremely complicated issues. The complexity becomes more intricate when one realizes that the issues themselves are hardly related to each other, let alone relevant to our discussion, with the exception of Part III. Therefore, only aspects relevant to our study will be dealt with in detail.

Part I is the setting of the whole pericope, though strictly speaking it is only relevant to Part VI. It provides the reason for delivering this public speech regardless of its content. It is this function which, I think, is relevant to our observation.

But first let us analyse the pericope.

Part I is an introduction exhibiting a "sabab" motive: Why 'Umar addressed the people in Medina. Its content is different from that of Ibn Musayyib in Mâlik, and it stand as terminus a quo: the point after which the pericope came to be known. It also contains a number of verisimilitudes.

Part II is an introduction of the actual speech. It lays down a reason why he ('Umar) was going to say what he had intended.

Part III deals with the legality of the Stoning Penalty as much as with the conviction procedures.

Part IV deals with false genealogy. It claims that the issue had been dealt with in the "Revelation", though it is no longer there.

Part V deals with the prohibition of over-rating Muḥammad beyond his worthy status.

Part VI deals with the dispute of the election, or election procedures for the leader of the Muslim community. It is the actual subject of Part I. I will return to Part III, but first I would like to say a few words concerning Parts IV and V. As can be seen, Part IV (false genealogy) has nothing to do with the main subject matter about which

‘Umar was provoked to talk. All that it serves is that prohibition of false genealogy once figured in the Book of God. As such, it would seem to be an equation of similar instance of Part III, namely the ruling of the SP still stands, but its text has been abrogated(!).<sup>37</sup> Part IV itself sometimes as an independent pericope has been connected in many instances with the decision of Mu‘āwiya in granting his father's name to Ziyād b. Abīh, his powerful governor in Irāq, who came to be known as Ziyād b. Abī Sufyān.<sup>38</sup> Around this action of Mu‘āwiya, a number of prophetic ḥadīths were produced to condemn the decision.<sup>39</sup>

Part V has very little to do with the main pericope. In fact, I can see no connection at all. As can be seen, it is an independent Prophetic ḥadīth. Elsewhere, the pericope is reported to be among the last words uttered by Muḥammad on his death bed.<sup>40</sup>

Part VI is the main section of the speech which was the reason for the whole pericope.

Now, Part III as I have remarked, contains three elements. Element -a- has only one component: "The Prophet had stoned and so did we", which agreed with part of element -d- of Ma.F.II: " .... someone might say: 'We do not find two penalties in the Book of God', has now been expanded in Bu.F.II, -b-, and furthermore, the objection is centred on the SP alone. This, as can be seen, stands as element -b- in Bukhārī II. Element -c- of Bu.F.II is missing in Ma.F.II. but appears as a pericope in its own right in Ma.F.I., on the authority of Ibn‘Abbās. In fact, Bukhārī combines -b- and -c- of Bu.F.II to form a single pericope of Bu.F.I. under the chapter of "Confession for adultery".<sup>41</sup> The common link for both authors is Zuhri,<sup>42</sup> who appears to be the sole authority for this pericope.<sup>43</sup> However, what is really important here is the

relevance of Part III in the main ḥadīth, on the one hand, and the implication of that part with reference to previous pericopes, on the other. Structurally and thematically, Part III has nothing to do with the main ḥadīth, for the issues discussed (by these parts) are quite unrelated to each other. Different commentators of the ḥadīth literature have resorted in vain to various techniques to show the relevance of different parts of the main body of the pericope.<sup>44</sup>

Now, the implication of Part III is that the SV was revealed by God as part of his Divine Laws.<sup>45</sup> The place of that revelation was "the Book of God". Everybody read it, understood it and memorized it. However, it is no longer there(!). And this is what really worries 'Umar for later generations may reject the SP on the ground that they do not find it in the Book of God.<sup>46</sup> The Book of God, here, must be the Qur'ān. But the pericope argues against itself. If the SV was revealed by God in the Book of God, and if everybody read it, understood it and memorized it, why is it no longer there? To answer this genuine question will take us into a number of contradicting traditions which were undoubtedly produced in response to such curiosity.<sup>47</sup> I say "undoubtedly", because first, these traditions contradict each other and, secondly, they were not known until towards the end of the second century of the Hijra. Needless to say, Bukhārī's version, as a pericope, is an al-maḡamāt of a number of traditions, prophetic and otherwise, originally circulated for different reasons but put together for not unobvious motives. Having said that, I would like now to go back to Part I and examine its relevance to the main body of the pericope.

The main object of this part is to demonstrate why 'Umar felt obliged to address the public and warn people about certain issues, which might reach their ears one day and disrupt the tranquility of the



community, as he had already heard some of these "gossips". In other words, he said what he had to say in reaction to what he had heard. His elaboration of unrelated issues was simply based perhaps on his insight into the future, while the inclusion of those issues in this particular incident was based on a momentum - an appropriate opportunity both in time and space.<sup>48</sup> As such, the function can be compared with sabab al-nuzūl in Quranic science, which might be thought to start as haggada and then be transformed into halakha when solutions for juridical disputes were not only urgent, but unavoidable.<sup>49</sup> As a piece immediately relevant to my concern, the issue can be traced from the Sīra/Maghāzi literature as a point of departure. There, in Ibn Hishām's work on the authority of Ibn Ishāq, the pericope is almost verbatim with Bukhārī.<sup>50</sup>

Now, while I agree that the inclusion of Parts III, IV and V in Ibn Ishāq's version represents problems, the main object of the pericope there is the dispute about the Khilāfa after the death of the Prophet. Its function is to show how Abū Bakr was elected and hence how the dispute was settled by confining the leadership to the Quraysh. In other words, if the Anṣār were content that no one but a Qurayshī had the right to the leadership of the Muslim community, then any claim to that authority by an outsider was void. Haggadic material was produced with that notion in mind. Ibn Ishāq's isnād reveals that the story was first originated in Medina, the chief tradent being Zuhri, but circulated in Irāq.<sup>51</sup> Whether the name of Zuhri was simply inserted to claim a complete and recognised isnād going back to Ibn 'Abbās is admittedly problematic. However, one may point to the discovery of Schacht, according to which such a tendency was common practice, particularly during the third century of the Hijra.<sup>52</sup> Thus, it is quite possible that Ibn Ishāq's isnād is perhaps among the early mechanisms of

authentication when production of spurious hadīths was profitable practice, particularly in Irāq.

As for the inclusion of Parts III, IV and V in the story of Ibn Ishāq, my tentative suggestion is that Ibn Ishāq, whose prime concern was to compose the sīra, got hold of the story when it was already in the hands of the jurists, and hence their interests were interjected into the story. It is unlikely that the name of Zuhri is a genuine authority for the whole pericope. We have already seen Mālik transmitting the pericope of the SV (Stoning Verse) as the source of the SP, not from Zuhri, but rather from Ibn Musayyib.<sup>53</sup> Furthermore, the content of Ibn Musayyib is not only different from the versions of Ibn Ishāq and Bukhārī as far as identifying the SV in the former, and transforming it, implicitly, into God's revelation in the latter, but is also different in the structure of the two episodes. To begin with, Ibn Musayyib's version in Mālik contains a different setting which, as I have pointed out above, is insignificant. The actual introduction to the main body of the pericope, element -b-, is totally different from that of Bukhārī, which is a version of Ibn Ishāq. Again, I have pointed out the possibility of its origin in the qadariyya dispute. The objection, hypothetical or otherwise, mentioned in Ibn Musayyib's version is about the imposition of two penalties, which is not to be found in the Book of God (element -d-). 'Umar's unwillingness to record in the Qur'ān that which was not Qur'ān is missing in Bukhārī's version and in Ibn Ishāq. In short, to repeat what I said earlier, if 'Umar was ever involved in the issue, only elements -d- and -e- of Ibn Musayyib's version could be thought to represent a "true" version of the episode. Yet, as we can see, neither of these is reported in Bukhārī. Part III of Bukhārī contains three elements which I have marked as -a-, -b- and -c-. None of these elements can truly match elements -d- and -e- of Ibn Musayyib. In fact, -a- and

-b- are completely new elements. Only for -c- can we find a corresponding element in the first pericope of Mālik. There, I pointed out how both the language and its implications reveal somehow a special jargon of the jurists, among whom the name of Zuhri - the chief tradent of Mālik in the first pericope - stands as a pioneer. It seems to me that Ma.F.I. must have originated as an independent pericope, asserting, but not demonstrating, that the SP is a just claim. In doing so, it went on to lay down juridical procedures as to whom and on what basis the SP could be applied. Similarly, Ma.F.III must have been circulated as an independent pericope asserting and demonstrating that the SP is a just claim. In doing so, it went on first to tell us about the origin and source of the SP and then to identify the relevant maxim.

In contrast, Bu.F.I. was probably developed from Ma.F.I and II. Without identifying the maxim, Bu.F.I elevated the ruling of the SP to the level of Revelation. Similarly, Bu.F.II was developed along much the same lines, but blatantly claimed that the "maxim" - which is by now the SV - was revealed to Muḥammad as part of the Book. The mentioning of āya in Ma.F.II is now fully exploited by means of "a revealed verse". However, the verse is not to be found in the Book of God, just as the verse of false genealogy - which is, incidentally, identified - is not to be found in the Book of God. Both these verses have been abrogated, but their rulings are still operative. This is naskh al-tilāwa duna al-ḥukm.

The move would seem to have started earlier, during the time of Ibn Ishāq, when a number of unrelated issues were interpolated into the story of the so-called "Ḥadīth al-Saqīfa". In this case the story of 'Umar cannot be earlier than 150 AH.<sup>54</sup> It was Tirmidhī, perhaps realizing the

composite nature of the pericope, who took steps to isolate the irrelevant material and to depend on Ibn Musayyib's version, which is now very improved, as a "true" version with respect to the Stoning Verse.

Under: Bāb fī Taḥqīq al-Rajm.

Tir.F.I.

On the authority of Ibn Musayyib:

1-3 Missing.

4. 'Umar b. Khaṭṭāb said: "The Prophet has stoned, Abū Bakr had stoned and so did I.

4. Had it not been for the fact that I hate to add anything to the Book of God, I would have written it in the muṣḥaf; for fear that with the passage of time, there might be some who, finding it nowhere mentioned in the Book of God, would simply reject it.

6-7. Missing.

Tir.Ḥudūd.C.7.H.1

Tirmidhī concludes by saying: "This is a sound and genuine ḥadīth".

#### COMMENT

The source of the SP is the Sunna. The SV is neither Quranic nor of revealed status. The opposition to the SP is neither claimed nor predicted. It simply exhibits 'Umar's anxiety that on account of the non-existence of the SP in the Book of God, it is quite possible that some people later would reject the penalty. He would like to have written in the muṣḥaf,<sup>55</sup> but he could not do so because it was not Quranic. Thus, the muṣḥaf is the written version of the Qur'ān. The pericope speaks for itself.

In the same chapter, Tirmidhī goes on to provide another hadīth.

Tir.F.II (cf. Part III, Bukhārī)

On the authority of Ibn'Abbās:

- a- 'Umar b. Khaṭṭāb said: 'God has sent Muḥammad with the Truth. He revealed to him the Book. Among what He has revealed was the Stoning Verse. Thus, the Prophet had stoned and so did we after him.
- b- I fear that with the passage of time, some one might say: 'We do not find the SP in the Book of God'. Thus, they will go astray for abandoning an obligation (farīqatin) which has been revealed by God.
- c- Verily, the SP is a just claim against a fornicator who has attained the status of iḥṣān when there is proof against him, or pregnancy, or confession'.

Tir.Hudūd: C.7.H.2.

Tirmidhī concludes by saying: "This hadīth is sound and genuine".

#### COMMENT

What has been said for Bukhārī's version (i.e., Part III), is equally true for this version. However, something very important is missing here. The sentence which reads: "We have read it, we have understood it and we have memorized it", has now been edited out. Is this a move to make "The Book" appear to be a general revelation within which the SV was revealed and "the Book of God" as other than the Qur'ān in which the SV was not part? In other words, it appears here that the

pericope tries to make a distinction: that the SV was revealed to the Prophet, not as part of the Qur'ān, but as ḥukm Allāh, and hence of a revealed status, and that the Kitāb Allāh, means the Qur'ān here, in which case the SV was not meant to be part of it. Ibn 'Arabī, who was perhaps so convinced, centres his discussion concerning the source of the Stoning Penlaty not on the ḥadīth of 'Umar, but on the ḥadīth of the hired hand, 'Asīf. Even there, he insists that the "Kitāb Allāh" is not the Qur'ān, but simply ḥukm Allāh.

I will recall here that the story of the 'Asīf, which was amalgamated from independent traditions, is posterior to the story of 'Umar, and that the latter story, which was primarily composed for the controversy of the Muslims' leadership but later came to be involved in the SP dispute, was probably the main impetus for the composition of the story of the 'Asīf.

To summarize, all the pericopes of the story of 'Umar tell us more about the concerns of the people who transmitted them than about the situations or events to which they are claimed to refer.

The Stoning Verse

a- Omit

Tay. H.25.

Han. vol.1, p.p.23,29,36,40,43,47,50,55; vol. 6, p.269

Bu. Hudūd: C.30, 31.

Mu. Hudūd: C.4, H.1.

Daw. Hudūd: C.23, H.6 (4418)

Dar. Hudūd: C.16.

Tir. Hudūd: C. 7, H.1 and 2.

Bay. Hudūd: C.2, H.3; C.4, H.6; C.30, H.2.

b-

الشيخ والشيخة فارجوهما البتة

Ma. Hudūd: C.1, H.10.

c-

الشيخ والشيخة إذا زنيا فارجوهما البتة

Han. vol. 5, p.183

Jah. Hudūd: C.9, H.1.

Hak. Hudūd: H.46 (p.360; cf.H.39,p.359 where the SV is ascribed to Ka<sup>c</sup>b).

Bay. Hudūd: C.4, H.7.

d-

الشيخ والشيخة إذا زنيا فارجوهما البتة نكالا من الله والله عليم حكيم

Han. vol.5, p.132.

e- الشيخ والشيخة إذا زنيا فارجموهما البتة نكالا من الله والله عَزَّ وَجَلَّ حَكِيمٌ

Hak. Hudūd: H.40, 41 (p.359)

Bay. Hudūd: C.2, H.5.

f- الشيخ والشيخة إذا زنيا فارجموهما البتة نكالا من الله ورسوله .

B: الشيخ والشيخة إذا زنيا فارجموهما البتة بما قضيا من اللذة

g- الشيخ والشيخة إذا زنيا فارجموهما البتة بما قضيا من اللذة .

Hak. Hudūd: H.42 (p.359)

h- إذا زنيا الشيخ والشيخة فارجموهما البتة .

San. H.13363.

i- الشيخ والشيخة إذا زنيا فا جلدوهما البتة .

(56)

Tab. (See Majma' al-Zawā'id, vol.6, p.265).



## CHAPTER VII

### (G) THE STORY OF ʿUBĀDA

The following pericope is about a statement ascribed to the Prophet in which he was allegedly claimed to have given a final decision concerning the punishment for adultery and fornication.

The name of ʿUbāda b. al-Ṣāmit, a companion of the Prophet who spent the later years of his life in Palestine, where he died in the year 34 A.H., <sup>1</sup> was given as the sole authority of the pericope transmitting it directly from the Prophet. <sup>2</sup> Significantly enough, the pericope itself did not come into existence and circulation until after the beginning of the third century. <sup>3</sup> No preformative period scholar ever incorporated, nor alluded to, it in his work. <sup>4</sup> Nevertheless, once it began to circulate, for reasons which we may be able to discern, it came to occupy a position of its own within the Muslim ikhtilāf discussions. It became known as: "ḥadīth of ʿUbāda" and it is for this reason that I have chosen to call it: "The Story of ʿUbāda."

Now, as one might guess, Mālik, our first source, does not transmit the pericope in any form. Nor does he give the slightest impression that he even knew it. <sup>5</sup> Bukhārī, on the other hand, though he, too, never transmitted or incorporated the pericope in his work, did nevertheless include part of it within the rubric section of the Kitāb al-Tafsīr for Sūra. 4. <sup>6</sup> There, the portion of the pericope: ". . . lahunna sabīlan", which in fact is a Quranic phrase (Q.4:15), is reported as a masoretic, that is textual, exegesis ascribed to Ibn ʿAbbās. <sup>7</sup> I will return to this point later. Here, I want to point out that failing to find the pericope in Bukhārī, and for the same reasons as those expressed earlier with

respect to the story of the pregnant woman,<sup>8</sup> we may turn to Muslim, and it is here that we find the pericope transmitted.

Mu. G.I.

On the authority of ʿUbāda b. al-Ṣāmit:

The Prophet said:

a- "Take it from me! Take it from me! God has now appointed a way for women; the virgin with the virgin, one hundred lashes and banishment for a year; the non-virgin with the non-virgin, one hundred lashes and stoning to death."

Mu. Ḥudūd.C.4.H.1

COMMENT

The pericope is precise and succinct. Its content suggests the introduction of a law replacing a previously suspended or temporary ruling. The opening invocation, however, is somehow peculiar; for the exact significance of the Prophet's statement, and of his repetition thereof, is unclear. Are we to infer from his opening remark that there existed at the time a widespread public disagreement and that Muḥammad the Prophet was thereby intervening to resolve the dispute? Or does the remark, as well as its repetition, serve merely as a rhetorical device designed to attract his "audience's" attention? Or are both interpretations inseparable?

In my view, the two interpretations are probably inseparable. Primary importance, however, must certainly be given to Muḥammad's personal intervention in order to resolve a dispute. Moreover, if this

is the case, then the repetition may be seen, not as a mere mnemonic device, but as a rhetorical device serving both to attract his audience's attention and to emphasise his intervention to resolve the dispute. The audience here is a third-century audience, and the problem consists of the familiar conflict between the fiqh penalty (SP) and the Quranic penalty (jald).

Thus, it is supposed - and perhaps the supposition is well grounded - that the issue behind the pericope is the punishment for fornication and adultery: corporal punishment for the former and capital punishment for the latter. This is the final ordinance by God. As such, the pericope can be categorised as legislative in both theme and in structure. Thematically, it deals with single crime against religion and God. Structurally, it lays down two types of punishments for the identical crime. The criterion for either punishment is the marital status of the culprit. It is for this reason that I have used the terms "fornication" and "adultery", though, strictly speaking, there is no such distinction in Islamic Law.<sup>9</sup> In short, the pericope is fairly "unified". Its context, however, cannot be perceived without prior knowledge of the previous ruling.

Now, the phrase which reads: "God has now appointed a way for women" is perhaps the key indication of the existence of the previous laws for the same crime. The same phrase, which not unintentionally mentions women, may lead us to the source of those laws. Q.4.15 reads:

والتى يأتين الفاحشة من نسائكم فاستشهدوا عليهن  
أربعة منكم فإن شهدوا فامسكواهن فى البيوت حتى  
يتوفاهن الموت أو يجعل الله لهن سبيلاً .

And those of your women who commit acts of gross moral turpitude, seek against them the testimony of four of your number, and should these bear witness, confine the women in quarters until death releases them or God appoints a way for them. <sup>10</sup>

In other words, the intelligibility of the pericope depends on fully understanding the previous laws.

Similarly, the citation of the Quranic phrase in the pericope exploits the source and nature of those laws. However, when we look into the Qur'an, we find more than one punishment for the same crime. To begin with, the verse immediately following Q.4:15 reads

وَالَّذَانِ يَأْتِيَانِهِمَا مِنْكُمْ فَأِذْوَاهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرَضْنَا عَنْهُمَا  
إِنَّ اللَّهَ كَانَ تَوَّابًا رَحِيمًا .

And those two of your number who commit like acts, reprimand them, but if they repent and amend, let them alone . . .

Furthermore, Q.24:2 reads:

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

The adulteress and the adulterer, flog each one of them one hundred lashes . . .

In short, there are three different punishments in the Qur'ān: life-imprisonment (Q.4:15); reprimand (Q.4:16); and flogging (Q.24:2). The pericope, on the other hand, introduces "new" punishments: flogging plus a year's banishment and flogging plus stoning to death. There are inconsistencies here, first within the Quranic injunctions and, secondly, between these injunctions and the new punishments of the pericope. Thus, the issue presently at stake is: what is the punishment for adultery and, consequently, what is the source of that punishment? It is an uṣūlī problem. Specifically, it comprises a conflict between the Quranic injunctions and the Sunna; for we have already seen how Muḥammad was allegedly claimed to have punished a number of culprits for the same crime. Exhibiting an uṣūlī problem, the pericope deals with the question on the same level.

The Prophet is claimed to have offered a personal explanation of the dispute. And it is exactly here that the repeated invitation has a significant meaning. "Take it from me! Take it from me!", often repeated three times, <sup>11</sup> is clearly intended to exhibit a personal

intervention into the dispute. <sup>12</sup> With explicit reference to Q.4:15 and perhaps including Q.4:16, the pericope emphasises the temporary role of those Quranic injunctions. Similarly, by maintaining the flogging in either case, the pericope makes it possible to apply the entire content of Q.24:2. Thus a compromise has been achieved not only in explaining the contradictory nature between Q.4:15, 12 and Q.24:2, but also between these Quranic injunctions on the one hand and the justification of the SP on the other. SP has been established by the Sunna of the Prophet. The conflict and the solutions would appear as follows:

Conflict:

- 1) Q.4:15,16 contradict Q.24:2.
- 2) Q.24:2 contradicts Sunna.

Solution:

Conflict -1- is a conflict between Quranic verses. Hence, one ruling must have been earlier than the other. The early one, in this case it has been decided Q.4:15,16 have been abrogated by the later one - Q.24:2. This is an instance of Qur'ān abrogating Qur'ān. But this solution led to another conflict - namely that Q.24:2 contradicts the Sunna, or more precisely, that Q.24:2 contradicts or is contradicted by the story of 'Ubāda. Chronological assumption was again a useful instrument. Since the story of 'Ubāda contains a phrase which reads: "God Has appointed a way for them (the women)", this was taken to be a

reference to Q.4:15. In such a case, the story of 'Ubāda would have to be earlier than Q.24:2. Thus, the story of 'Ubāda is an explanation and not an abrogation of Q.4:15. This is an instance of takhṣīṣ al-ʿāmm. i.e. the Sunna specifying the Qur'ān <sup>13</sup>. The next step was to decide which injunction would come forth. The best solution was to postulate the revelation of Q.24:2. This, however, created another conflict - namely the Sunna v. the Qur'an. But the problem is less grave than having a later Sunna contradicting an earlier Quranic verse. Since the story of 'Ubāda differentiates between the punishment of a non-virgin and that of the virgin, Q.24:2 was taken to be an abrogation of one part only of the story of 'Ubāda - namely, the dual punishment for the virgin. This is an instance of the Qur'ān abrogating the Sunna. <sup>14</sup> However, the retention of Flogging plus Stoning for the non-virgin appears to contradict the contents of a number of Prophetical ḥadīths in which Muḥammad is persistently reported to have only stoned the non-virgins. But the fact that the stories of Mā'iz, Ghāmidīyya, Juhaniyya, etc., are all Sunna renders the conflict even less grave than a conflict between the Sunna v. the Qur'ān. This meant Muḥammad's own decisions are in contradiction with his own earlier statement. This is a conflict of Sunna v Sunna. Thus, the solution to this problem was dogmatically easy. The story of 'Ubāda, which is allegedly an early Sunna, is abrogated by later Prophetical decisions. Hence, we have an instance of late Sunna abrogating early Sunna. The SP is reserved for non-virgins, and Flogging plus Banishment <sup>15</sup> for virgins. That this was the final ruling is illustrated by the story of the 'Asīf. Such were the arguments and chronological arrangement presented by Shafi'i, the earliest uṣūlī and, indeed, the first scholar to deal with these cases. <sup>16</sup>

Needless to say, the pericope was undoubtedly produced to settle both the dispute concerning the legality of the SP, on the one hand, and

the conflict of the Quranic injunctions, on the other. The mere fact that the pericope did not appear until the beginning of the third century A.H. and that it was not adduced or cited by any author of the pre-formative period is a convincing proof, at least for me, that the issues behind the pericope were prior to its contents. <sup>17</sup>

Now, Muslim has another version of the same pericope. In the same chapter, with an almost similar isnād, he offers the following version:

Mu. G. II.

On the authority of ʿUbāda b. al-Sāmit:

a.a- Whenever the Prophet of God received the revelation/inspiration, he felt its troubles and his face would go ashen in colour. One day the inspiration came down to him and he showed the usual signs of distress. When recovered, he said:

a- "Take it from me! God has now appointed a way for women. The non-virgin with the non-virgin and the virgin with the virgin. The non-virgin, one hundred lashes, then stoning to death; the virgin, one hundred lashes and then banishment for a year."

Mu. Ḥudūd: C.4 H.2

#### COMMENT

This version and the previous one share the same basic theme and, to some extent, the structure. There are, however, significant differences in the details of the two. Most noteworthy is the method by which element -1-achieves/acquires its present status. In Mu. G.1



element -a- occupies an exegetical role as a personal intervention by the Prophet. In Mu. G.II, it acquires a revealed status. God has now appointed a way and instructed Muḥammad to tell the people what that way was. Burton puts it well:

The stoning penalty has been established by God through the medium of that part of the Prophet's Sunna which was inspired. <sup>18</sup>

The involution of these pairs - al-thayyib bi al-thayyib wa al-bikr bi al-bikr - is perhaps another deliberate attempt to imitate the formulaic expression of the Qurʾān with reference to punishments: "al-Nafs bi al-nafs wa al-ʿayn bi al-ʿayn wa al-anf bi al-anf wa al-udhun bi al-udhun" (Q.5:45) and "al-ḥurr bi al-ḥurr wa al-ʿabd bi al-ʿabd wa al-unthā bi al-unthā" (Q.2:178). In Mu.G.1. each pair is followed by the ruling. In Mu.G.11 the pairs are provided in what came to be known as laḥf wa al-nashr: (involution and evolution) which was considered an attractive rhetorical device. <sup>19</sup>

And finally, the order of the dual punishments has been firmly and clearly stated in Mu. G.II with the help of thumma i.e., "and then". The pericope is a composite. The opening statement, serving both as setting and verisimilitude on the one hand and as a means of elevating the ruling into the revealed status on the other, is a deliberate addition to the version Mu. G.I. There are two possible reasons for such an undertaking. Either to show that God has personally intervened to explain His laws, and hence enforcing Shāfiʿī's attitude but promoting it further into Revelation, or to show that God has ordained new laws to replace old ones and hence exhibiting the abrogation of Revelation by Revelation. In both cases, Muḥammad acted as a mere agent. I would be inclined to accept the

second alternative for a single reason. The combination of the opening statement and its explicit implication with the citation of "God has now appointed a way for women" makes it highly probable that what was going to follow was new. In other words, the pericope exhibits the concerns of the later Uṣūlis who were in favour of the Sunna abrogating the Qurʾān.<sup>20</sup> At this point, we may look to our third source Tirmidhī to see if the pericope was reported there.

In the Chapter: "That which has come down to us concerning stoning to death the non-virgin", we find:

Tir. G.I.

On the authority of ʿUbāda b. al-Ṣāmit:

The Prophet had said:

- a- Take it from me; for God has now appointed a way for women. The non-virgin with the non-virgin; one hundred lashes and then stoning to death. The virgin with the virgin, one hundred lashes and one year's banishment."

Tir. Hudūd: C.8. H.4.

Tirmidhī concludes by saying: "This ḥadīth is sound and authentic. Some scholars amongst the Companions of the Prophet, such as ʿAlī b. Abī Ṭālib, Ubayy b. Kaʿb, ʿAbdallāh b. Masʿūd and others, have based their practice upon this ḥadīth. Their attitude has been adopted by some scholars such as Iṣḥāq b. Rāhwayh. Other scholars amongst the Companions of the Prophet, such as Abū Bakr, ʿUmar and others, have said that only the non-virgin should be stoned to death. There are a number of cases to support this view; the Prophet had been invariably reported to have applied only the SP, such as in the case of Māʿiz and others. He

had never given orders to flog anyone who was sentenced to be stoned to death. This view was also adopted by Sufyān al-Thawrī, Ibn Mubārak, Shāfi'ī and Aḥmad b. Ḥanbal".<sup>21</sup>

#### COMMENT

With the exception of the sequence and arrangement of the material, the pericope is a verbatim of Mu. G.I. Consequently, what has been said there is equally applicable here. What is of interest here is the rubric: Bāb mā jā' fī rajm al-muḥṣan, and Tirmidhī's commentary above. Both the rubric and the commentary exhibit a single attitude: the legality of SP for the non-virgins. Tirmidhī is of the same opinion as Shafi'i, or to be more precise is supporting him. This takes him into a lengthy discussion concerning existing conflicting opinions. To begin with, he grades the pericope as "sound and authentic." In other words, he accepts the content of the pericope as being truthfully and honestly reported from the Prophet. However, in reminding us that the Prophet had, on several occasions, applied only the SP and that he had never given orders to flog anyone condemned to death, he has explicitly demonstrated that Muḥammad's actions must have abrogated his statement. / Flogging has been superseded by the mere application of the SP for the non-virgin. We have already seen how he reported the pericopes of 'Umar. There, two versions were incorporated under: Bāb taḥqīq al-rajm.<sup>22</sup> Here, the rubric is not concerned with the source of the SP but rather with the legality of the SP for the non-virgin. This view is identical to the view expressed by Shāfi'ī.<sup>23</sup> We may now consider what could possibly have provoked the emergence of the story of 'Ubāda in the first place.

I have already pointed out that 'Ubāda's pericope did not appear until the beginning of the third century. I have also said that Shāfi'ī was the first scholar to cite and adduce the pericope.<sup>24</sup>

Now, the isnāds of the pericope, irrespective of its versions, unequivocally prove that the pericope had first originated in Baṣra. In every case, Hasan al-Baṣrī (d. 110),<sup>25</sup> "the Zuhri of Baṣra", appears to be the common link. His own immediate transmitter is Ḥiṭṭān b. 'Abdallāh al-Raqāshī (d. 74 in Baṣra)<sup>26</sup>, who stands as the sole transmitter from 'Ubāda b. al-Ṣāmit (d. 34 in Palestine). By the time of Shāfi'ī, and particularly when he visit Baṣra, towards the end of the second century, Hasan had been dead almost 90 years. Yet his pericope which claims unbroken transmission had never been known or transmitted by anyone else either in his own city or outside it until the beginning of the third century. The Kūfans, up to and including Shaybānī, knew nothing of this pericope, nor did Mālik.<sup>27</sup> At this point, we may investigate the basis on which Tirmidhī reported that among the supporters of the dual punishments were 'Alī, Ubayy and Ibn Mas'ūd. The first thing to note here is that these were the early Kūfans. It is reported that, when a woman guilty of adultery was brought before 'Alī in Kūfa, he flogged her and on the following day he stoned her to death. A voice of protest was raised. 'Alī replied: "I have flogged her in accordance with the Book of God and stoned her to death in accordance with the Sunna of the Prophet."<sup>28</sup> Different versions indicate different but mutually related protests. Some are reported to have said: "What is this stoning? All that we have in the Book of God is flogging!"<sup>29</sup> Others are reported to have said: "But you have applied two penalties!"<sup>30</sup> To both objections, 'Alī was claimed to have offered an identical reply: "I have stoned her in accordance with the Sunna of the Prophet and flogged her in accordance with the Book of God." Needless to say, the reference to the Book of God

here is Q.24:2. Now, this is the only pericope known to the Kūfans which imposes dual penalties with reference to the SP and flogging. Similarly, another ḥadīth ascribed also to ʿAlī, in which he is claimed to have flogged a culprit and then sent him into exile for a year, was known to the Kūfans. Shāfiʿī, in his arguments with the Kūfans, had persistently deplored their attitude in transmitting authoritative pericopes from ʿAlī and then not observing their contents.<sup>31</sup> Thus, although there is no reason to suppose for one second that ʿAlī's dicta are authentic, there is some certainty that they were prior to the story of ʿUbāda. As much as I would incline to say that the story of ʿUbāda was produced in response to the hard-line attitude of Shāfiʿī and the like, the general outline of the stories of ʿAlī, produced perhaps for not entirely dissimilar reasons, could be thought to be the main impetus for the proliferation of the story of ʿUbāda. But the stories of ʿAlī were themselves rejected by the Kūfans because they contradicted the accepted local practice. This was a good opportunity for the Baṣrans to adopt those outlines and put them into the mouth of the Prophet. Prior to that, the adopted Quranic formula: "Until God appoint a way for them (women)", was known not as part of the Prophetical ḥadīth but as part of an exegetical device. The so-called: Tafsīr Mujāhid asserts that the phrase was explained by Mujāhid as follows: "ʿAw yajʿal Allāhu lahunna sabīla" "qāl: ay al-ḥadd." <sup>32</sup> That that was the most acceptable and perhaps the only possible "authentic" report as far as Bukhārī was concerned, is clear from his treatment of the matter under the Kitāb al-Tafsīr, within the rubric glossing several words and phrases from Sūra 4. The rubric reads: "Ibn ʿAbbās said: 'a way for them' means stoning to death the non-virgin and flogging the virgin." <sup>33</sup>

It seems to me the pericope originated as a gloss of Q.4:15,16. Later, with the help of the existence of general outlines of ʿAlī's

pericope, the pericope was transformed into a Prophetical ḥadīth standing in its own right. Once it occupied a position of its own, it was quite possible to elevate its content into revealed status. Thus, it was a matter of choice later as to which version to adopt. Tirmidhī, like Shāfi'ī before him, supported the view that SP was established by the Sunna. They achieved this partly by applying only the appropriate sections of the pericope on the one hand, and partly by invoking other Prophetical ḥadīths on the other.

## SYNOPSIS (G)

The following chart is meant to show those who transmitted the ḥadīth of ʿUḇāda without Unit a.a- and those who included it as an introduction to Unit a.

### Unit a. alone

- San. H.13308  
Han. vol.1, p.476; vol.5, p.p.313 and 320  
Bu. Tafsīr: Sūrat. 4, Rubric  
Mu. Hudūd: C.3, H.1 and 3  
Daw. Hudūd: C.23, H.3, (H. 4415, Vol.4, P.569), cf. H.4416-7  
Tir. Hudūd: C.8, H.4.  
Jah. Hudūd: C.7, H.2.  
Dar. Hudūd: 19  
Bay. Hudūd: C.2, H.2; C.13, H.1.

### Unit a. preceded by Unit a.a-

- San. H.13359  
Han. vol. 5, p.p. 317, 318, 321 and 327.  
cf. p. 190; and vol.6, p.103  
Mu. Hudūd: C.3, H.2.  
Bay Hudūd: C.2, H.1.  
Bagh. Hudūd: vol.2, p.44.  
Tab. (See Majmaʿ al-Zawāʿid, vol. 6, Hudūd: p.264-5).

## **Section Two**

**I K H T I L Ā F**



## INTRODUCTION

The significance of the Ikhtilāf - disagreement of the law specialists, the Fuqahā' - in the elaboration of Islamic law is usually underestimated and often miscalculated. Its impact is frequently estimated to be minor, trivial and about matters of no great importance; for whenever there is a point of dispute, God and His prophet are the final court of appeal. The Quran 4:59 reads: ". . . and if you dispute among yourselves about something then appeal to God and His prophet . . ." The role of Ikhtilāf is thought to embrace only those problems outside the Scripture and Sunna of the Prophet; while its existence is taken to be a blessing for the community. <sup>1</sup>

This theological attitude is mainly due to the assumption, originally proposed and promptly disposed of, by the law specialists themselves that Ikhtilāf was almost invariably the result of individual understanding of the textual prop (Naṣṣ, pl. nuṣūṣ). This assertion was largely designed to serve two purposes: (1) To recognise individual authority, thereby promoting self-interests of the specialists, and (2) To assert the priority of the textual prop. The former has not only been claimed but also demonstrated distinctly insofar as all works of the Fiqh report and preserve the disagreements. The priority of the textual prop, however, still remains to be equally demonstrated.

Nevertheless, whenever a serious effort to assess the causes of Ikhtilāf is made, it is the priority of the textual prop which is made to bear the burden of the arguments. Thus, when the first systematic work of this kind attempted to assess the causes of the Ikhtilāf al-Fuqahā', both the terminology and the examples had to be borrowed from a

well-established system of exegetical science - which presupposes precisely the point at issue.

In his book, entitled: al-Inṣāf fī bayān asbāb al-khilāf,<sup>2</sup> a sixth-century Spanish Mālikite Scholar, Baṭalyawsī, (d.521) assessed the causes of the Ikhtilāf as follows:-

Under the rubric: "Dhikr al-Asbāb al-Mūjiba lil-khilāf kam hiya",<sup>3</sup> the author declares: ". . . The disagreement among the people of our religion stems from eight factors. These are:-

1. Polysemy (Ishtirāk al-Alfāẓ wal-Ma'ānī)<sup>4</sup>
2. Distinction between Veridical and Tropical  
(al-Ḥaqīqa wal-Majāz)<sup>5</sup>
3. Distinction between Simple and Compound  
(al-Ifrād wal-Tarkīb)<sup>6</sup>
4. Distinction between Statements of specific significance and  
Statements of general significance:  
(al-Khuṣūs wal-'Umūm)<sup>7</sup>
5. Problems of Transmission and Narration  
(al-Riwāya wal-Naql)<sup>8</sup>
6. Creative interpretation due to the lack of a textual prop  
(al-Ijtihād fī mā la naṣṣ fīhi)<sup>9</sup>
7. Abrogation (al-Nāsikh wal-Mansūkh)<sup>10</sup>
8. Free exercise of juridical discretion, termed:  
al-Ibāha wal-tawsī'.<sup>11</sup>

Having put forward those eight factors as the causes of disagreement among the Muslim 'ulamā', the author discusses every rubric with examples to prove his point. It is worth noting here that the examples given by the author are the same examples traditionally adduced by the authors of works on Ikhtilāf fi uṣūl al-fiqh -Variation in the Principles of Jurisprudence.<sup>12</sup> This science developed towards the end of the third century, after Shāfi'i's early attempts to systematise the law, and must be distinguished from later works on the causes of Ikhtilāf of the law specialists.<sup>13</sup> The examples given by the author are either derived from Scripture or the Sunna or from both. Even for the heading: "al-Ijtihād fī mā la naṣṣ fīhi", where one would expect to find an example with no Scriptural or ḥadīth connection, the author confines the area of disagreement to qiyās -analogy; hence restricting Creative interpretation (topos 6) to an existing precedent or institution.<sup>14</sup> Examples provided for al-Ibāḥa wal-tawṣī', i.e., free exercise of juridical discretion, are: Adhān -Calling to prayer; Takbīr 'alā al-Janā'iz - Funeral prayer; Takbīr al-Tashrīq - Ceremonial prayer for 'Īd; and al-Qirā'āt al-Sab' - Seven variant Readings, all of which are traditionally known to have been established by the Sunna.<sup>15</sup> It is thus evident that all these headings, as they are presented by Baṭalyawṣī, deal, or are connected with textual props. In short, personal interpretation of an existing naṣṣ is the sole cause of all disagreements in the Islamic law.

A second serious work of the same category, but with a different emphasis, is the work of the seventh/eighth-century Ḥanbalite scholar, Ibn Taymiyya (d.728) entitled: Raf' al-Malām 'an al-a'immat al-a'lām.<sup>16</sup> There the causes of the Ikhtilāf are first generalised in three broad categories as follows:

- a. The disbelief of the faqīh that the Prophet had indeed uttered the textual prop (in question).
- b. The disbelief of the faqīh that the problem (in question) has got anything to do with the textual prop (i.e., the irrelevance of the nass to the problem in question).
- c. The belief of the faqīh that such-and-such an injunction (i.e., mentioned in the textual prop) is abrogated (no longer valid). <sup>17</sup>

In a somewhat contradictory manner, Ibn Taymiyya immediately goes on to provide ten sub-headings serving as the detail for all causes for the Ikhtilāf. These are as follows:-

1. Ignorance of the textual prop (cf. with (a), (b) and (c), above).
2. Distrust of the authenticity of the textual prop.
3. Weakness of the textual prop (i.e., da'īf, due to a defect in the chain of transmitters - isnād).
4. Having strict stipulations for the acceptance of an isolated report (khabar al-Wāḥid = that is a report handed down by one chain of narrators as opposed, for instance, to the mutawātir = that is a report handed down through several chains of transmitters).
5. Loss of remembrance of the textual prop.
7. Belief that the textual prop bears no juridical weight.
8. Conviction of that faqīh that an injunction in a different prop restricts the obvious meaning of the prop in question (i.e., khāṣṣ and ʿāmm, or muṭlaq and muqayyad). <sup>18</sup>

- 9 Conviction of the faqīh that the textual prop (ḥadīth) is contradicted by evidence which proves to him that the ḥadīth must be either weak or abrogated, and must be reinterpreted accordingly (i.e., ḥadīth v. local/common practice).
10. Conviction of the faqīh that the textual prop (ḥadīth) is contradicted by a stronger textual prop (i.e., ḥadīth v. Qur'ān or a weak ḥadīth v. a strong ḥadīth.<sup>19</sup>

Like Baṭalyawsī, Ibn Taymiyya too claims the priority of the textual props over the Ikhtilāf. His examples too are explicitly traditional. However, unlike Baṭalyawsī, he acknowledges the existence of Ikhtilāf as a result of personal opinion, as can be seen from the heading (1) Ignorance of the textual prop. Nevertheless, examples provided for (1) are 15 incidents in which several Companions are reported to have adopted their personal opinions concerning certain issues due to their ignorance of the appropriate textual prop. However, they changed their opinions after being informed about the existence of an appropriate textual prop.<sup>20</sup> It is worth noting here that the examples themselves are ḥadīths and āthār which come down to us from the Classical Period.<sup>21</sup> Furthermore, in each incident the textual prop emerges as the valid proof for the issue at hand. No examples are provided for the fugahā' of the Pre-formative Period. Referring to his examples for the topos (1), Ibn Taymiyya is content to say,

. . . anyone who believes that every authentic tradition must have reached scholars in general (a'imma), or a specific scholar (imām), is insolently and preposterously wrong (fa huwa mukhtī'un khaṭa'an fāḥishan qabīḥan). No one can say that all the Traditions were collected and written down . . . . for all these famous compendia

(al-Sunan) were put together at a time when all those a'imma of the schools were extinct (innamā jumi'at ba'da inqirād al-a'imma al-matbū'īn . . .) <sup>22</sup>

What is not clear here is whether the demonstrated examples of the succeeding generations - Pr. F.P. Scholars - are to be understood to have ceased after the discovery of an appropriate prop or not. However, one thing is clear, at least to me. Ibn Taymiyya accepts the role of ra'y as among the causes of the Ikhtilāf.<sup>23</sup> But his examples illustrate only occasions when a corrective prop turned up later.

A similar attitude was shown by two authors, who have undertaken to trace the causes of the Ikhtilāf of the Fuqahā': Waliyy Allah Dihlawī (d. 1180 AH) in his book entitled: al-Inṣāf fī bayān asbāb al-Khilāf,<sup>24</sup> and 'Alī al-Khafīf, a contemporary Egyptian scholar, whose book is entitled: Muḥāḍarāt fī asbāb ikhtilāf al-Fuqahā'.<sup>25</sup> Like their predecessors, they too adduce similar techniques and almost identical examples to prove their point of view.

It is clear that although the authors of the works on asbāb al-khilāf recognise ra'y as among the reasons of the disagreement among the law specialists, they deny it a major role in the elaboration of the Fiqh and hence they deny its impact upon the textual prop/s. This attitude arises from one common "assumption"; namely, that Islamic law, right from the beginning, originated from four sources (Uṣūl): the Qur'ān, the Sunna, Ijmā' and Qiyās. This assumption was not only refuted by Schacht in his discussion of the origins of Islamic Jurisprudence,<sup>26</sup> but may also be proved to be void - from a practical point of view - by analyses of the arguments of the very champion of that theory, Shāfi'ī. In many instances, if not all, Shāfi'ī's personal interpretation seems

to be the final court of appeal. Hence, how can anyone claim that the source of such-and-such problem is the Qur'ān or the Sunna, or both when one imposes one's own decision upon the textual prop.<sup>27</sup> Had a little more attention been paid to the nature and historical evidence of Ikhtilāf of the Pre-formative Period, as well as to the true nature of the Four Sources in their practical rather than their theoretical aspect, it might have been realised that the causes of Ikhtilāf are personal opinions and personal interpretation. Similarly, the sources of the law, which may be thought posterior to the Ikhtilāf, are Ra'y, Qiyās, Ijmā', Sunna and the Qur'ān in that order. It was the influence of these systematised norms, known as the Principles of Jurisprudence, which led the surveyors of the causes of the Ikhtilāf to assess the causes in harmony with the Uṣūl on the ground that most of the juridical problems are well known to have an appropriate textual prop. But the mere existence of a prop does not necessitate that a particular scholar must have known it, nor that he must have employed it for such-and-such a problem. Furthermore, as I hope to demonstrate, most of the textual props connected with juridical problems came into full existence only in the third century, i.e., the Classical Period. The nature and composition of some of these props show that it was the Ikhtilāf which shaped their forms.

In Section I we have seen how and why those ḥadīths dealing with adultery were employed, where they were employed and who employed them. At the same time we have managed, I hope, to discover that the composition of each story, in its myriad versions, demonstrates more the concerns of those who transmitted and preserved them than the historical facts which they are claimed to portray for the ideal community - the community of Muḥammad.

The following section is complementary to Section I. We will examine here the Ikhtilāf of the fuqahā' in all important issues on the problems arising from the issue of zinā.



## CHAPTER VIII

### zinā

Almost all Islamic juridical literature of the Pre-Formative Period, as well as that of the Formative Period, lacks a clear and full definition of zinā. This is due partly to the popular legal practice of each region and partly to the right of each individual jurist to produce his own definition. Thus, whenever we are offered a definition of zinā of a particular legal school, be it Sunnī or Shī'ī, it is not from the Imām of the school but, rather from an authoritative work of the Post-Classical Period. Kāsānī (d.587) <sup>1</sup>, for instance, became a classical spokesman for Abū Ḥanīfa (d.150); Ibn 'Arabī (d.468) <sup>2</sup> and Ibn Rushd (d.520) <sup>3</sup> are spokesmen <sup>5</sup> for Mālīk (d.179); Abū Ishāq al-Shīrāzī (d.476) <sup>4</sup> and Nawawī (d.667) <sup>5</sup> are Shāfi'i's representatives (d.204); Ibn Qudāma (d.620) <sup>6</sup> *Ibn Ḥanbal (d.241) and Ibn Ḥazm (d.456) a spokesman for* a spokesman for Dāwūd al-Zāhirī (d.270) <sup>7</sup> and so on.

One does not need to list all the definition given by the above authors in order to see the differences between their schools on what constitutes zinā; one definition, taken at random, will do. Kāsānī offers the following definition:

zinā is a term for unlawful sexual intercourse (al waṭ' al-ḥarām) in the forepart of a living female (fī qubul al-mar'at al-ḥayya) performed with mutual consent and committed in the abode of Justice (fī Dār al-'Adl) by those liable to the Islamic Law - those who, while committing such an act, are free from all facts of possessory rights and

ambiguity (shubha) for such action, free from the right of ownership (milk) and the true nature of marriage or ambiguous marriage. <sup>8</sup>

Tedious as it may seem, Kāsānī was trying to accommodate all previous opinions of his school, particularly the disagreement between Abū Ḥanīfa, the Imām, and his two disciples Abū Yūsuf (d.182) and Shaybānī (d.189), as well as to facilitate opinions and some of the nuṣūṣ which, by his time, had gained the approval of his own predecessors of the Post-Classical Period and at the same time to demonstrate the inadequacy of other definitions proposed by rival schools. A close examination of each of his provisions will elucidate the matter.

1. AL-WAT' AL-ḤARĀM

The intention of this phrase is to exclude any sexual intercourse between spouses during the menstruation period - which is unanimously agreed by all the schools to be forbidden - and at the same time to guard against the use of terminology such as Ityān al-mar'a or Ityān fi'l al-mar'a (to do/to perform/to execute/ to commit sexual intercourse with a woman) which would include any sexual intercourse between a mature woman and minor or insane male. In all schools, except the Ḥanafite, the woman in such a case is susceptible to the fixed penalty (the hadd). Some members of the Ḥanafite school disagreed among themselves.

According to Shaybānī, <sup>9</sup> Abū Ḥanīfa does not consider an act of this nature as zinā. His argument is that legally the act is not called zinā, for the minor and the insane are ineligible and unaccountable to the Law. Thus, the female participant, by means of being involved with

an ineligible person, is not punishable by the hadd; for she cannot be called zāniya: an adulteress. Abū Hanīfa employs a rather clumsy and crude technique to demonstrate how a female partner becomes susceptible to the hadd punishment for zinā. He argues that ".....a woman is not punished for zinā because of her pure involvement in the act, but rather because of the male partner who is a pre-requisite factor in such an act (al-aṣl).". Thus, unless the aṣl is subject to the Law, the female partner is not and should not be accountable for the act in which she is only a complementary factor, farʿ. The minor and the insane in this case are, of course, aṣl. But they are ineligible and unaccountable to the Law. Since the aṣl in this case is not susceptible to the hadd, the female partner becomes automatically unsusceptible to the hadd, because of her complementary position. Accordingly, a mature male with a female, minor or insane, is punishable by the hadd for zinā because he is the aṣl. But the female minor or insane are not punishable by the hadd because of their ineligibility to the Law, despite the fact that, in this particular example, they fulfilled their complimentary role from the legal point of view. <sup>10</sup>

Zufar (d.158), a close friend of Abū Hanīfa who started as traditionist but later took pleasure in speculation, that is if the books of the Ṭabaqāt are correct, <sup>11</sup> disagreed with his colleague. He rejected the distinction his friend made between the aṣl and the farʿ, and is reported to have added: "....It takes two to commit the act. Hence, whoever is eligible to the Law should be punished accordingly, for the ineligibility of one should not prevent the law being applied to those who are accountable for their conduct. A mature partner in this case, male or female, should be punished by the hadd, for his or her action is pure zinā." <sup>12</sup>

Abū Yūsuf and Shaybānī followed the opinion of their master. Their arguments are similar to those of Abū Ḥanīfa. However, Abū Yūsuf is also reported to have taken Zufar's side on the question of the mature woman with a minor or insane male.<sup>13</sup>

Thus, the Irāqī masters of the Pre-Formative Period disagreed amongst themselves on the question of sexual intercourse between the mature and the minor or insane. Abū Ḥanīfa, Abū Yūsuf and Shaybānī employed a cumbersome argument to avert the ḥadd punishment from the mature female because they did not consider her a prerequisite factor. Consequently, they considered a mature male who had his way with a minor or an insane female as zānī and hence punishable by the ḥadd. By means of a clumsy distinction between aṣl and far', they conceded that a female minor and an insane female do fulfil the complementary role. Realizing that the fulfilment of the role would lead to the resumption of the responsibility and hence to its consequences, i.e. the ḥadd punishment, they resorted to a second argument whereby the ineligibility of the female minor and/or the insane female to the Law prevents her from being susceptible to the ḥadd punishment. Zufar rejected this clumsy distinction across the board. For him, it takes two to commit the action. Hence, the ineligibility of one partner should not stand as an impediment to the application of the Law to another partner who is accountable for his actions. It is worth pointing out that neither the Qur'ān nor the ḥadīth has been adduced to substantiate the argument, neither for nor against.

An almost similar argument to those of Abū Ḥanīfa and his supporters was employed, perhaps coincidentally, by Mālik in the Hijāz, but not without some distinctions. Like Abū Ḥanīfa, Mālik does not consider a mature female with a minor male as zāniya. However, when a

mature female becomes involved with an insane male, she is punishable by the ḥadd for zinā. His argument is that she gains satisfaction from the insane male but not from the minor.<sup>14</sup> There is no confirmed report from Mālik on the question of a mature male with an insane female. However, Ibn al-Qāsim, a student of Mālik (d.191),<sup>15</sup> was asked by the compiler of the Mudawwana, Saḥnūn (d.240), about Mālik's attitude on this particular problem. He replied:

I have not heard anything from Mālik on this issue. But, personally, I think the case is similar to that of a mature male with a minor female. In fact, it is more serious than the latter (!).<sup>16</sup>

Now, Mālik's view on the question of a mature male with a female minor is that if it is possible to have sex with the latter (yujāma' mithluhā), the ḥadd punishment should be imposed upon the person who fornicated with her (uqīm al-ḥadd 'alā man zanā bihā).<sup>17</sup> In other words, while Abū Ḥanīfa considers that susceptibility to the ḥadd punishment depends on the accountability of the aṣl regardless of the ineligibility of the far', Mālik considers the possibility of having sex with the minor as a condition for the susceptibility to the ḥadd. The difference will be seen in a case where it is impossible to have sex with a female minor. Abū Ḥanīfa would inflict the ḥadd punishment upon the male culprit because of his sexual assault which is zinā. Mālik, in such a case, would not subject the culprit to the ḥadd punishment. Such a crime falls under ta'zīr.<sup>18</sup> Conversely, a mature woman with a male minor is not punishable because it is not possible to have sex with him. Mālik does not elaborate to explain how or when it becomes possible to have sex with a minor. However, judging from his argument that a female who fornicates with an insane male should be punished with the ḥadd because she gains

satisfaction from him, we can conclude by saying that puberty for Mālik is the criterion for the possibility of having sex. Whether the minor ejaculates or not is irrelevant as long as it is possible. Once it is possible, anyone who fornicates with him or her, provided the fornicator is mature, should be subjected to the hadd punishment. What we should bear in mind here, is that the differences, whether in terms of regional or internal variation, depend on juridical speculations and nothing more.

If one author of the Post-Classical Period - Zakariyyā al-Anṣārī (d. 926 ) is correct, Shāfi'ī, familiar with these arguments, adopted Zufar's point of view.<sup>19</sup> However, I have not managed to find an identical view in the Umm or in the Risāla. Assuming that it is the well known view of Shāfi'ī, since it was reported not only by his own supporters of the late Post-Classical Period, but also by a supporter of his opponents belonging to the same period, in fact a little earlier than the author of Asnā al-Maṭālib, it is quite clear that even Shāfi'ī, who would not hesitate to employ any available Prophetical hadīth, did not manage to find an authoritative nass either to substantiate the argument or to refute the view of his opponents.

By the Classical Period, however, a Prophetical hadīth dealing with the unaccountability of the insane, the minor, and the sleeper, came to be the locus classicus conventionally employed in the above argument. The hadīth, which has been reported in various forms, runs as follows:

The Pen has been stopped from writing the actions of three people: The insane until he regains his faculty; the minor until he becomes mature and the sleeper until he awakens.

(i.e. actions of these three people will never be recorded  
....)<sup>20</sup>

Sarakhsī, a fifth-century Ḥanafite scholar who knew the ḥadīth very well, found it, perhaps, unsuitable for the argument. Hence he relied on lexical usage and a rhetorical device to support Abū Ḥanīfa's view. He argues:

..... the action of a male, minor or insane, is zinā only as far as the common usage is concerned and not in the law (Shari'a). Therefore, the action of the associate - a mature female - cannot be called zinā in the Shari'a. If God calls her in the Qur'ān: Zāniya (adulteress), it should be understood as "Muznā bihā" (the one who has been fornicated with).

Sarakhsī goes on to draw a Quranic parallel to support his exegetical tricks to show what the term "zāniya" (adulteress) could mean:

It is similar to other Quranic usages. For instance, Q.69:21 reads "fī 'īshatin rāḍya". This should be understood as: "fī 'īshatin mardyya" (i.e. "In blissful life", to be understood as "in the state of life with which one is contented"). Similarly, Q.87:21 reads "mā'in dāfiq". This should be understood as "mā'in madfūq" (i.e. "gushing water", to be understood as "the water which is caused to burst forth").<sup>21</sup>

He goes on to repeat himself and to praise his own methodology (wa hādha fiqhun daqīqun wa farqun ḥasan ....), until he adduces a textual proof upon which the whole argument, he claims, depends. He says:

The origin of this problem is the ḥadīth of ʿUmar: Avoid punishments (ḥudud) as much as possible. For an Imām, to make a mistake in pardon is better than to make a mistake in punishment. So, whenever there is a way to acquit a Muslim of an offence, do acquit him. <sup>22</sup>

Anticipating an objection to his attitude regarding the punishment of a mature male who has committed sexual intercourse with a female, minor or insane, Sarakhsī says: "... the ḥadīth is not applicable to this case, because there is no ambiguity (shubha) in the case; the man is zānī (adulterer)." <sup>23</sup> We will be meeting the above maxim, which restricts the application of the ḥudūd, on several occasions, for it became a classical dictum used to dismiss many acts which otherwise would have been considered zinā. <sup>24</sup> The saying itself was known to both Abū Yūsuf and Shaybānī. The former knew it, in a different form, as a saying of the Companions. (Idraʿū al-ḥudūd bil-shubuhāt mastataʿtum, fal-khaṭaʿ fil-ʿafw khayrun min al-khaṭaʿ fil-ʿuqūba). <sup>25</sup> The latter, like Abū Yūsuf, knew it as a saying ascribed to Ibrāhīm al-Nakhaʿī, an authority of the Kūfans (d.95/6). <sup>26</sup> Mālik, too, knew it, but as a general maxim (Yuqālu idraʿū al-ḥudūd mastataʿtum). <sup>27</sup>

On the other hand, Shāfiʿī, who reports the maxim sometimes as ʿUmar's saying and at other times as Ḥammād's (Kūfan, d.120), is hesitant to employ it as a Prophetical dictum. <sup>28</sup> Instead, concerning those cases where the ḥadd can be avoided (mainly rape on the female side), Shāfiʿī provides only a rubric: "Chapter: Concerning cases in which the ḥadd



can be avoided." <sup>29</sup> In one place, Shāfi'ī points out the misuse of the maxim by the Irāqīs. <sup>30</sup> By the time of Al-Māwardī (d.450), however, the maxim was firmly established as a Prophetical hadīth. <sup>31</sup> It was left to Ibn Ḥazm (d.456) to launch a severe and unprecedented attack on the validity and authenticity of the maxim. <sup>32</sup> However, Ibn Ḥazm was fighting against a strong current of belief, for the maxim was already incorporated in the Classical Collections, some of which had gained canonical status. <sup>33</sup>

## II. FOREPART OF A FEMALE (FĪ QUBUL AL-MAR'A)

This proviso is designed to exclude sodomy from the sphere of zinā. Thus, sodomy is not to be included under the ḥadd of zinā. <sup>34</sup>

Abū Ḥanīfa holds the view that sodomy is not zinā; hence the two crimes are different and to be treated differently. <sup>35</sup> His arguments here are similar to those adduced by him for the inapplicability of the ḥadd punishment to the mature female who has sexual intercourse with a minor or insane male. According to the works of the Post-Classical Period, Abū Ḥanīfa argues that not only are the two crimes prohibited on different grounds, but also they have different names. <sup>36</sup> Sodomy is called: liwāt, and a sodomite is called lūṭī, while fornication proper the names are zinā for adultery, zānī for adulterer, and zāniya for adulteress. "Thus," he claims, "the dissimilarity of names is clear proof of dissimilitude of the acts" (wakhtilāf al-asāmī dalīlun 'alā ikhtilāf al-ma'ānī fil-aṣl). <sup>37</sup> Furthermore, the grounds on which zinā was prohibited are missing in sodomy. These are the mingling of genealogy (ikhtilāf al-ansāb) and the abandonment of children (taḍyī'

al-awlād), <sup>38</sup> both of which are absent from sodomy. In addition to that, if the punishment for sodomy were equivalent to that for zinā, then the Companions should not have disagreed among themselves. <sup>39</sup>

Abū Yūsuf and Shaybānī <sup>40</sup> disagree with their master. They place sodomy under the zinā ḥadd because both crimes are prohibited on a similar ground: unlawful sexual intercourse (al waṭʾ al-muḥarram). Moreover, in the Qurʾān both crimes are called fāḥisha, and both acts are prohibited. Furthermore, the prime condition in zinā, which is to ejaculate into a secret part of a human being, is present in sodomy with no form of ambiguity (shubha) (wa huwa ʾilāj al-farj fil-farj ʿalā wajhin maḥzūrīn lā shubhata fihi liqaṣd saḥ al-māʾ, wa qad wujida dhālika kullāhu). <sup>41</sup>

It is worth pointing out that this is a crude analogy (qiyās) derived from the parallel of an existing decision on zinā, showing that adultery and sodomy are to be treated in the same manner on the grounds that both crimes have common features: both are defined as unlawful sexual intercourse, both are called "fāḥisha", <sup>42</sup> both are prohibited in the Qurʾān, and both have a single aim: sexual satisfaction which is achieved outside the legal bonds of marriage or concubinage (nikāḥ or milk). <sup>43</sup>

Mālik, like Abū Yūsuf and Shaybānī, places sodomy under the zinā ḥadd. Unlike the latter, however, Mālik derives his opinion from the prominent Medinan scholar Ibn Shihāb al-Zuhrī (d.124), who said to Mālik: "He who commits sodomy, should be stoned to death, whether muḥṣan or not" (i.e. chaste, betrothed, possibly married, free, Muslim, etc.). <sup>44</sup> Nevertheless, Mālik does not consider sodomy between spouses as punishable by the ḥadd or zinā. <sup>45</sup> In fact, he even considers such

✓ acts permissable (huwa waṭ'un yughtasal minhu). His disciple Ibn al-Qāsim (d.191) disagrees with him. After reporting his master's view on the subject, Ibn al-Qāsim comments: "Personally, I think the punishment of (zinā) hadd should be applied here; because God has said: '....You mount men for your satisfaction ....' (Q.7:81) and ' .... you indeed commit a vile deed (fāḥisha) (Q.27:54). In another place, he said: 'And those among you who commit it .....' (Q.4:16). So God has called both crimes 'fahisha'." <sup>46</sup> The argument adduced here is that the term fahisha has been used for both crimes as prohibited acts. Hence there is no distinction as to whether the crime has been committed by spouses or not. Shāfi'ī, who places sodomy of all sorts - man + man, man + female, and husband + wife -under the hadd punishment of zinā, summarizes the dispute and its complications. On sodomy, other than that of spouses, Shāfi'ī says:

I have been told by a man, on the authority of Ibn Abī Dhī'b, from al-Qāsim b. al-Walīd, from Yazīd (presumably the son of Ibn Munkadir), who said: "Alī had stoned to death a sodomite!" This is our opinion too. I would stone to death every sodomite whether muḥṣan or not. Their master, i.e. Abū Ḥanīfa with reference to Abū Yūsuf and Shaybānī, says: 'A sodomite is not punished by the hadd.' According to him, if a sodomite commits sodomy during the pilgrimage, his state of sanctity (iḥrām) is not affected, nor is he required to purify himself by taking a bath unless he has ejaculated. His own disciples Abū Yūsuf and Shaybānī disagree with him. They say: "A sodomite is similar to a zānī. If he is muḥṣan, then he should be stoned to death, and if he is not muḥṣan, then he should be flogged 100 lashes!" In addition to that, God has made it quite clear

what is and what is not zinā. He permitted sexual intercourse with women on two grounds only: (1) Through marriage, and (2) through concubinage, and forbade this to happen in any way other than under the two conditions mentioned. How then can any one claim that there is confusion or ambiguity between the two crimes! <sup>47</sup>

The prohibition mentioned in the argument has been elaborated elsewhere in the Umm. Discussing the meaning of Q.23:5-7 (and those who abstain from sex, except with those joined to them in the marriage bond, or with those whom their right hand possesses, they (in their case) are free from blame. But those whose desires exceed these limits, those are transgressors.), Shāfi'ī argues that "...any sexual intercourse outside these limits is zinā." <sup>48</sup>

Turning to the question of sodomy between spouses Shāfi'ī employs similar techniques and verses to place the crime under the zinā hadd. <sup>49</sup> However, it is fascinating to see what must have prompted Mālik to allow sodomy between spouses. Discussing the question of sodomy between husband and wife (Ityān al-nisā' fī adbārihinna), Shāfi'ī, in addition to the above argument, goes on to say:

God has said: "Your wives are as a tilth unto you; so approach your tilth wherever/however you wish ..." (annā shi'tum) Q.2:223. There are two possibilities concerning the meaning of the verse: (a) To mount a wife wherever and whichever way the husband wishes, for annā shi'tum, could mean however you wish, there is no restriction, (i.e. even anal intercourse is permissible), in the same manner as one approaches his tilth. (b) That the word "ḥarth" (tilth) is

intended to mean 'sowing', for tilth is a place where one could produce a child. Now, it is not possible to produce a child from any place other than the forepart of a female. With respect to these possibilities, our friends (i.e. the Medinians) disagreed among themselves concerning sodomy between spouses, some of them (such as the Ḥanafite of the Irāqīs) understanding the latter interpretation (i.e. place of fertility) prohibited sodomy between spouses; others (i.e. Mālik) understanding the former possibility (i.e., wherever/however) permitted the act between spouses. As far as I am concerned, their approaches originated from these two possibilities which I have mentioned. So, I have to appeal to the Prophet. I tried to find a Prophetical ḥadīth to see who is right and who is wrong. I found two contradictory ḥadīths from the Prophet. One, from Thābit - and this is Ibn 'Uyayna's tradition - from Muḥammad b. al-Munkadir, on the authority of Jābir b. 'Abd Allāh, who said: "The Jews used to say that 'He who mounts his wife from the rear will cause her to give birth to a cross-eyed child. So God revealed Q.2.223. Your wives are as a tilth unto you; so approach your tilth wherever/however you wish ...'" The second ḥadīth is from my uncle Muḥammad b. 'Alī b. Shāfi'ī ...., from Khuzayma b. Thābit who said: "A man asked the Prophet about mounting women from the rear (ityān al-nisā fī adbārihinna). The Prophet replied: 'Certainly, it is permitted' ī ḥalāl). When the man was about to depart, the Prophet said to him: 'What did you mean? Which of the two passages did you mean?' (fī ayy al-jirbatayn, or fī ayy al-ḥarzatayn or fī ayy al-khaṣfatayn?) Is it from the rear to the forepart? If that is what you meant, then it is

right. But if you mean, from the rear to the rear, (anal intercourse) - then no! God is not shy in the matter of truth! Do not mount your wives from rear!"

Shāfi'ī concludes by accepting the latter hadith and hence favouring the second of the proposed interpretations of Q.2.233.<sup>50</sup>

By the time of Ibn Ḥanbal (d.241), several hadiths, Prophetical or otherwise, were in circulation. Some of them found their way into the Classical Collections. Among those are:

Sodomy between non-spouses

(a) Against the hadd punishment:

1. The Prophet said: **إِنْ أَخَوْفُ مَا أَخَافُ عَلَى أُمَّتِي عَمَلُ قَوْمِ لُوطٍ**

The thing I fear most from my followers (Ummatī) is sodomy.<sup>51</sup>

2. The Prophet said:

He who commits sodomy is cursed.<sup>52</sup>

**مَلْعُونٌ مَنْ عَمِلَ عَمَلِ قَوْمِ لُوطٍ**

(b) For the punishment (death) but not the zinā ḥadd:

1. The Prophet said:

**مَنْ وَجَدْتُمُوهُ يَعْمَلُ عَمَلِ قَوْمِ لُوطٍ فَاقْتُلُوا النَّاعِلَ وَالْمَنْعُولَ بِهِ**

2. The Prophet said:

أَقْتُلُوا النَّاعِلَ وَالْمَنْعُولَ بِهِ

Those whom you discover committing sodomy, kill the active and the passive. <sup>53</sup>

- (c) For the zinā hadd, however, stoning to death only:

1. The Prophet said:

مَنْ وَجَدْتُمُوهُ يَعْمَلُ عَمَلِ قَوْمِ لُوطَ فَإِذَا رَجَّوْا الْأَعْلَى وَالْأَسْفَلَ  
[ النَّاعِلَ وَالْمَنْعُولَ بِهِ ]

Those whom you discover committing sodomy, stone to death both the upper one and the one who is at the bottom. <sup>54</sup>

2. Ibn Shihāb's decision (see pp.205above).  
3. Ibn Musayyib's decision (see p.205 above).  
4. 'Ali's decision (see pp.206above, adduced by Shāfi'ī).

- (d) Equating with zinā, i.e. both incur a similar punishment:

1. The Prophet said:

إِذَا أَتَى الرَّجُلُ الرَّجُلَ فَهَبَا زَانِيَانِ وَإِذَا أَتَتِ الْمَرْأَةُ  
الْمَرْأَةَ فَهَبَا زَانِيَتَانِ

If a man/woman mounts another man/woman then both are adulterers/adulteresses. <sup>55</sup>

(e) Against the Practice:

1. The Prophet said:

لا تؤتوا النساء في أعجازهن

Do not mount women from the rear. <sup>56</sup>

2. The Prophet said:

لا تؤتوا النساء في أدبارهن

Do not mount women from their backsides. <sup>57</sup>

3. The Prophet said:

من أتى امرأته في حيض أو في دبرها أو أتى كاهناً  
فتد كفر بما أنزل على محمد

He who performs sexual intercourse with his wife  
*or mount her from her backside*  
during her menstruation, <sup>or</sup> consults a soothsayer, has  
rejected what had been revealed to Muḥammad (i.e. is  
an infidel). <sup>58</sup>

4. The Prophet said:

ملعون من أتى امرأته في دبرها

He who mounts his wife from the rear is cursed. <sup>59</sup>



Of all the textual proofs mentioned above, only two non-Prophetical hadīths were known to the masters of the pre-Formative Period. C-4 was known by the Irāqīs. However, only Abū Yūsuf and Shaybānī, and perhaps Zufar, decided the issue accordingly. C-2 was Mālik's only authority for placing sodomy under the Stoning Penalty, except when performed by spouses. Shāfi'ī, who knew both C-2 and C-4, and hence placed sodomy under the death penalty but not the zinā hadd, did not accept Mālik's distinction. Apart from understanding that the core of the problem rested on sexual interpretation, he knew a Prophetical hadīth to support only one of the two interpretations. (See C-1 above).

A similar view, concerning sodomy of all sorts, is ascribed to Aḥmad b. Ḥanbal (d.241). According to al-Khiraqī (d.334), the earliest Ḥanbalite scholar to leave a juridical work, entitled: Mukhtaṣar al-Khiraqī,<sup>60</sup> Ibn Ḥanbal applied the death penalty to the sodomites without making any distinction. However, unlike the early masters, Ibn Ḥanbal, in addition to the textual proofs mentioned, knew B-1 and 2 from which he adduced his opinion.<sup>61</sup> We should still bear in mind, however, that most of the textual proofs mentioned above were not known to these masters. Nevertheless, it is quite clear that towards the end of the Classical Period, it was generally known that most of the prominent successors (Tābi'ūn) were of the opinion that the punishment for Sodomy was equal to that of Adultery. Tirmidhī (d.279), for instance, after transmitting A-1 and 2 and B-1 and 2, comments: "This hadīth has many defects with reference to its chain of authority (isnād). Furthermore, we know of no one, but 'Āṣim b. 'Umar al-'Umairī, who has transmitted this

al-Khiraqī

hadith from Suhayl b. Abī Ṣāliḥ. Generally, 'Aṣim's hadīths are unaccepted due to his (weak) memory." (...yuḍā'af fil-hadīth min qibal ḥifẓihi).<sup>62</sup> Tirmidhī goes on to summarize the opinion concerning sodomy:

People have differed with respect to the punishment of the sodomite. Some favoured the Stoning Penalty for every sodomite (...aḥṣan aw lam yuḥṣin). This is the opinion of Mālik, Shāfi'ī, Aḥmad, (b.Ḥanbal) and Ishāq (b. Rāḥwayh, d.238). Others, among the jurists of the second generation (Tābi' ūn) such as Ḥasan al-Baṣrī (d.110), Ibrāhīm al-Nakha'ī (Kūfan d.95/96), 'Atā' b. Abī Rabāḥ (Meccan d. 114 or 115) and many others, said: "The punishment for the sodomite is equal to that of the adulterer (al-zānī)." This is also the opinion of Sufyān al Thawrī (Meccan d.161) and the people of Kūfa."<sup>63</sup>

Thus neither the Meccans or the Medinans, nor the Irāqīs, Baṣrans or Kūfans, of the Pre-Formative and Formative Periods knew a Prophetic hadīth adduced by Shāfi'ī to disapprove of sodomy between spouses, and that of Aḥmad b. Ḥanbal with respect to the death penalty for Sodomy. All hadīths on the above subjects came into existence during the Classical Period. Thus it is not surprising to see them being exploited and adduced in every possible situation by the Post-Classical scholars, for they also - like the hadīths discussed for proviso 1 in the definition - became the LOCUS CLASSICUS for the juridical literature.

### III. LIVE WOMEN

This proviso was invented to guard against the ikhtilāf of the Post-Classical Period; hence there is no hadīth to support it, nor to

refute one's point of view, it might be interesting, however, to examine the criteria on which the Post Classical scholars based their arguments.

Most of the Ḥanafite scholars did not consider a man who assaulted a dead woman punishable by a particular ḥadd.<sup>64</sup> However, discretionary punishment, known as ta'zīr, i.e. deterrence, is recommended. Since the purpose of this doctrine is to "deter" the offender and to make him an example for others, the appropriate punishment is left to the discretion of the authority, usually expressed as the Imām. However, we must realize the difference between the technical terminology of ta'zīr, when it is used to recommend a punishment for any given offence, and its usage when "the matter should be left in the hands of Imām." The former, it seems, means a punishment must be applied, though what kind of punishment is left to the discretion of the authority. In the latter instance, the entire issue is left to the discretion of the authority. He may, if he thinks it appropriate, apply some sort of punishment as a deterrent or, alternatively, he is free not to punish the offender at all.<sup>65</sup>

Mālikites, according to the most popular opinion (al-mashhūr fil-madhhab), believe the crime is punishable by the zinā ḥadd. Conversely, if a woman assaults a dead man (!) she is not punishable by the zinā ḥadd because of lack of enjoyment.<sup>66</sup> Shāfi'ites do not apply the ḥadd punishment, because this kind of crime is distasteful by nature. It is recommended, however, that the offender should be placed under ta'zīr punishment for violating the sanctity of the dead person.<sup>67</sup> Furthermore, some Shāfi'ites do impose the ḥadd punishment.<sup>68</sup>

The Ḥanbalites, like the Shāfi'ites, adopted these two contradictory opinions. However, their most popular opinion is the application of the ḥadd punishment on the grounds that it is more of a

disgrace than committing adultery with a living woman. Ibn Qudāma, who favoured the doctrine, managed to find an early opinion ascribed to Awzā'ī (Syrian authority, d. 157).<sup>69</sup>

Not unrelated to this matter, is animal assault: (Ityān al-bahīma). There are a number of traditions, Prophetical and non-Prophetical, to support the applicability or inapplicability of the hadd punishment.

Kāsānī makes it clear that his masters, i.e. the Pre-Formative Period Ḥanafites, had never discussed the matter. Then he goes on to say: "However, the hadd punishment should not be applied here. But the animal must be killed; for we know a ḥadīth ascribed to 'Umar in which he commanded that the animal be burnt."<sup>70</sup>

Shāfi'ī briefly discussed the issue in his Umm.<sup>71</sup> He seems to favour the hadd, though he does not mention what kind of hadd. His disciple al-Muzanī (d.264) reports that Shāfi'ī later changed his mind.<sup>72</sup> As far as the Shāfi'ites are concerned, three different opinions have been reported. The most popular opinion is that the crime is punishable by ta'zīr. The second opinion favours the death penalty. The third opinion places the crime under the zinā punishment.<sup>73</sup>

Ibn Ḥanbal is reported to have given two contradictory opinions: ta'zīr to the offender and the animal should be killed, or the offender is punishable by the hadd of sodomy. The Hanbalites followed these opinions as a matter of choice. However, some treated the matter as that of zinā.

Ibn Qudāma (d.620), who reports all these opinions of the school, favours ta'zīr and the killing of the animal. <sup>74</sup> He concludes by saying that there is no authentic textual proof for the application of the ḥadd punishment. (Lam yaṣihh al-naṣṣ wa lā yumkin qiyāsuhu 'alā al-waṭ'). <sup>75</sup>

Now, the ḥadiths, adduced by the masters of the Post-Classical Period as the Locus Classicus are as follows:

(a) In favour of the death penalty:

1. Ibn 'Abbās said: "The Prophet said: He whom you find assaulting an animal, kill him and kill the animal" Ibn 'Abbās was asked: "What is wrong with the animal?" He replied: "I have heard nothing from the Prophet concerning that question. However, I think he hated to see people eating its meat or making use of the animal. And it has been done that way." <sup>76</sup>

Tirmidhī concludes by saying: "We only know this ḥadīth from Ibn 'Abbās." <sup>77</sup>

2. 'Umar's practice. (see p. 215 )

(b) In favour of the criminality of the act but without the ḥadd:

The Prophet said: He who assaults an animal is cursed." <sup>78</sup>

ملعون من أتى البهيمة

(c) Against any ḥadd punishment:

The Prophet said: "No ḥadd punishment upon him who assaults an animal." <sup>79</sup>

لا حد على من أتى البهيمة

Tirmidhi concludes: "This is a more authentic hadith than the previous one. Most well learned men base their practice upon this hadith. This is also the opinion of Aḥmad (b. Ḥanbal) and Ishaq (b. Rāhwayh).<sup>80</sup>

#### IV. PERFORMED WITH MUTUAL CONSENT

Here the question of rape is adduced. According to the Fiqh literature, rape can be exercised by male on female, female on male, adult on minor, and insane on sane. The schools differ according to their respective attitudes, i.e. accountability and unaccountability for Abū Ḥanīfa, possibility and impossibility for Mālik, and accountability for Zufar, Shāfi'ī and Aḥmad. However, the only man not to receive the ḥadd punishment is a man who has been forced by the Imām or sultān - the high authority - to have sex with a woman, for he cannot defend himself against the Imām.<sup>81</sup> Abū Yūsuf and Shaybānī do not employ this distinction, nor do they punish a man or a woman who has been raped, or forced to have sex. Abū Yūsuf bases his decision on the rulings of three early prominent scholars: Sha'bī, Hasan al-Baṣrī (d.110) and Ibn Shihāb al-Zuhrī (d.124): "No ḥadd punishment for a woman who has been raped." He concludes by saying: "This is the best of what I have heard!"<sup>82</sup>

Mālik does not accept a woman's claim of being raped without clear proof, such as bleeding or external evidence provided by an eye witness.<sup>83</sup> It is worth noting here that Mālik does not know the Prophetical ḥadīth with respect to restriction of the ḥadd punishment, or a living practice, in general, dealing with those who had acted unwillingly or under duress. However, he knows a non-Prophetical

ḥadīth, on the authority of Nāfi' (Medinan authority, d.117) in which 'Umar (the Caliph) is reported to have flogged and banished a slave who raped a slave girl, but did not punish the girl for she had acted under duress.<sup>84</sup> Whether or not Mālik rejected the decision of this ḥadīth is not clear. For his attitude to a raped woman is contrary to the pericope. The pericope does not clarify whether 'Umar applied the ḥadd punishment after collecting external evidence or not. Yet Mālik incorporated the pericope in his Muwatṭa' without comment and with no indication of whether or not he favoured the decision therein. However, taking into consideration his usual attitude of providing comment on any given pericope with whose ruling he disagrees, it is perhaps not unacceptable to suggest that the pericope was added to the Muwatṭa' later, or if that is not the case, that it was known to him that 'Umar applied the ḥadd punishment after obtaining external evidence.

Shāfi'ī follows the opinion of Abū Yūsuf and Shaybānī. Furthermore, he demands compensation (mahr al-mithl) from the rapist if he is accountable for his action.<sup>85</sup> I have not managed to find a prophetic ḥadīth employed by Shāfi'ī to support the inapplicability of a punishment to a person who has acted under duress. I assume that if Shāfi'ī knew a ḥadīth to that effect, then it must have been the ḥadīth of 'Umar in the Muwatṭa'.

Bukhārī, who devotes a special book to Duress: (Kitāb al-Ikrāh), found only two Prophetic ḥadīths connected with the issue in general. One is the most famous ḥadīth, which deals with the principle of "To each according to his intention" transmitted on the authority of 'Umar alone from the Prophet ( ..... innamā al-a' māl bi al-niyyāt wa innamā li kull 'imri'in mā nawā ....).<sup>86</sup> The second concerns Muḥammad's prayer for those people who remained in Mecca unwillingly after his own expulsion

from the city and his flight to Medina. However, Bukhārī manages to adduce several Qur'anic verses which consider those who acted under duress as being unaccountable before God. These are Q.16:106, 3:28; 4:97; 84:75 and 24:33.<sup>87</sup> Under the particular chapter dealing with rape: "Chapter: "If a woman is raped no punishment upon her." (Bāb idhā istukrihat al-mar'at 'alā al-zinā fa lā ḥadd 'alayhā), Bukhārī transmits the ḥadīth of Nāfi' ascribed to 'Umar, which we have already seen used by Mālik.<sup>88</sup>

Now, the Locus Classicus for the inapplicability of the ḥadd punishment came to be:

1. "A woman was raped during the Prophet's era. The Prophet warded off the ḥadd punishment from her but punished the rapist."<sup>84</sup> (Istukrihat imra'atun 'alā 'ahd resūli allāh. Fa dara'a 'anhā al-ḥadd wa aqāmahu 'alā al-ladhī aṣābahā.<sup>89</sup>
2. "A woman, during the era of the Prophet, went out, heading for the mosque to say her prayers. On her way she was intercepted by a man who raped her. When he finished, she shouted, so he ran away. Another man passed her. She said to him: 'That man has done such-and-such to me!' Then she passed a crowd of the Emigrants, (Meccans in Medina) and said to them: 'That man raped me.' The crowd ran after the man and caught someone whom she identified as the rapist. They brought the man before the Prophet. The Prophet ordered him to be stoned to death. Before the commencement of the punishment, the actual rapist stood up and said: 'It is I who raped her!' The Prophet said to the woman: 'Go! God has forgiven you.' Then he turned to the accused and



spoke. He gave his orders to stone to death the actual rapist. Later, the Prophet said: 'He had repented to the extent that if all the people of Medina were sinners, the reward of his penance alone would suffice for them all to be forgiven.'" 90

3. The Prophet said: "My people are forgiven (not to be held accountable) for their actions which were committed under three categories: Mistake, forgetfulness and coercion. ('Ufiya li/'an ummatī 'an thalāth: al-khaṭa', wal-nisyān wa mastukrihū 'alayh.) 91
4. 'Umar and the case of the slave. (see p. 218 above)
5. Sa'īd, going back to Ṭāriq b. Shihāb: "A woman was brought to 'Umar accused of having committed adultery. The woman said to 'Umar: 'I was asleep. No sooner did I awake than I found a man crouching over me.' So 'Umar left her alone and did not apply the ḥadd punishment to her." 92
6. On the authority of Ṭāriq b. Shihāb: "A woman was brought to 'Umar, whose case was as follows: She went to a shepherd and asked him for a glass of water. The man refused to give her a glass of water unless she allowed him to have sex with her. She did. 'Umar did not know what to do with her. So he summoned 'Alī and sought his advice. 'Alī said: 'She was destitute.' So 'Umar gave her something (to help herself) and released her.'" 93

7. The Prophet said: "Three people are unaccountable for their actions ....." (see above)

V. IN THE ABODE OF JUSTICE

The proviso reflects the controversy concerning "territorial limits for the ḥadd punishment" which was not surprisingly very much disputed by the early masters. The issue concerned here was as follows: If a Muslim soldier committed a crime in enemy territory, should he be punished immediately by the general of the contingent, thus giving rise to the problem of desertion, or should the culprit be left alone until the return of the army to their base. The issue was very much a tension between theory and practice and discussion was confined to Irāq and Syria. <sup>94</sup>

Abū Ḥanīfa, as well as his two disciples Abū Yūsuf and Shaybānī, do not apply ḥadd punishments in enemy territory. However, unlike their master, whose main ground is the fear of desertion, Abū Yūsuf and Shaybānī know two ḥadiths going back to Ḥudhayfa and 'Umar b. Khaṭṭāb. Both authorities employed the same argument as Abū Ḥanīfa. <sup>95</sup> Awzā'ī (Syrian authority, d.157) accepts the decision but only for the punishment of theft. As far as other punishments are concerned, the inapplicability does not arise. Abū Yūsuf, astonished by Awzā'ī's crude distinction, wonders: "Why only the cutting-off of the hand?" (wa mā lilqat' min bayn al-ḥudūd) <sup>96</sup> Substantiating his claim, Abū Yūsuf gives theoretical reasons. Whether general or governor, the moment he steps outside his own territorial limits, the ruler loses all authority (i.e.

legal jurisdiction) over his army (..... idhā kharaja min al-darb fa-qad inqata<sup>c</sup> at wilāyatuhu ‘anhum ....). Furthermore, how can he apply hadd punishment when he is neither a qāḍī (judge) nor an amīr (i.e. Imām) whose decisions are valid! <sup>97</sup>

Now, according to Schacht, Mālik made a compromise to the effect that "the commander can postpone the hadd punishment if he was otherwise engaged in enemy country." <sup>98</sup> My own efforts to find Mālik's decision to that effect have been in vain. Nevertheless, the attitude is typical of Mālik when there is no approved authority known to him. A ruling such as " ..... personally, I think the matter should be left to the discretion of the Imām" <sup>99</sup> is quite familiar in the Muwatta'. It was left to Shāfi'ī to refute the opinion of the Irāqīs and that of Awzā'ī. Shāfi'ī argues:

hadd punishments should be applied anywhere, whether in enemy lands or in Muslim lands. God has set His fixed punishments to be applied at all times in all places. His rulings and orders are equally to be observed by all Muslims at all times and in all places ....As for the fear of desertion .... that should not prevent the application of God's orders. If a man deserts the army, then it is too bad for him ..... Furthermore, the proof he (Abū Yūsuf) adduces is utterly abominable (munkar) and unauthentic (ghayr thābit). He claims: "I was told by a shaikh ...." when we ask him: "Who is this shaikh of yours?", he replies: "Makhūl from Zayd b. Thābit!" <sup>100</sup>

With this subtlety, Shāfi'ī ends his disapproval of the proof of Abū Yūsuf.

The tone and language used by Shāfi'ī to refute his opponent's point of view reveal the extent of the tension between theory and practice, current in his own time with his adversaries. Yet, despite this bitter discussion, none has managed to produce a Prophetic ḥadīth to support his point of view. I do not agree with Schacht that Abū Yūsuf and Shaybānī knew a Prophetic ḥadīth with respect to the prohibition of applying ḥadd punishment in enemy territory. I do not know why the information provided by a commentator - presumably Abū al-Wafā' al-Afghānī (20th century) <sup>101</sup> - should figure as an authentic report concerning people who lived more than ten centuries before himself. Furthermore, if Abū Yūsuf or Shaybānī had known a Prophetic ḥadīth to that effect, Shāfi'ī would never have argued so bitterly against them. The only authority of Abū Yūsuf and Shaybānī known to Shāfi'ī for the above issue was the ḥadīth of 'Umar, which he rejected as munkar ghayr thābit. This leads me to believe that whatever the source of the ḥadīth referred to by Schacht, the pericope must have been produced to enshrine the opinion of Abū Yūsuf and Shaybānī, or ascribed to them later.

Now, we have already seen Awzā'ī excluding the punishment of theft from the doctrine of "territorial limits for ḥadd". We have also seen that he provided no authority or textual proof to that effect. The only conceivable ground, then, for Awzā'ī's decision is the sort of distinction provided by Shāfi'ī, namely that theft combines two equal rights and duties: ḥaqq Allāh (Divine right) and ḥaqqul-ādami (civil right). Awzā'ī, considering that the crime involved a civil right, did not think it was appropriate to delay the punishment. Admittedly, the objection could be raised that we have no report of a similar exclusion for homicide, which is generally accepted as concerning a purely civil right. My tentative explanation is that Awzā'ī was simply idealizing the

practice,<sup>102</sup> presumably as a solution to his own current problems. However, his idealization was endorsed by a Prophetic ḥadīth. Tirmidhī, in the Chapter: "On the prohibition of cutting off the hand on the battlefield (Bāb mā jā' 'an lā tuqṭa' al-aydī fī al-ghazw), provides the following Prophetic ḥadīth:

Qutayba, going back to Busr. b. Arṭāṭ. The Prophet said:  
 "Hands should not be cut off during a raid." (.... lā tuqṭa' al-aydī fī al-ghazw.)<sup>103</sup>

Commenting on the pericope, Tirmidhī says: "This ḥadīth is peculiar" (gharīb). His remark, as I understand it, applied to the content, not to the chain of the transmitters, for Tirmidhī recalls that the ḥadīth had also been transmitted by people other than Ibn Lahī'a -the immediate transmitter from 'Ayyāsh b. 'Ayyāsh to Qutayba. Tirmidhī finds the content of the ḥadīth strange in that only theft is excluded from punishment on the battlefield, whereas in the case of other crimes committed on the battlefield, ḥadd could be applied. Tirmidhī finds no acceptable explanation for the decision of the ḥadīth. However, he does report that some scholars - among them Awzā'ī himself -favoured the practice of excluding theft from punishment on the battlefield, for fear of desertion. The mention of Awzā'ī twice in the comment is a further proof that the issue was a current problem in Syria.<sup>104</sup>

Not quite related to this issue is the question of applying punishments in the mosque for fear of defilement (talwīṭ/tanjīs) of the place of worship. Schacht puts the case: "There are two Irāqian opinions as to whether the ḥadd punishment ought to be applied in the mosque or not. Abū Ḥanīfa answers in the negative, referring to a tradition from the Prophet ..... Abū Yūsuf cites a tradition from 'Alī to

the same effect, and a tradition in which the Successor Mujāhid (d. after 100) declares: "People used to disapprove of applying the ḥadd punishment in the mosque." <sup>105</sup> .... Similarly, doctrine is ascribed to Ibrāhim Nakha'ī (d.95/86). The opposite opinion was held and applied in practice by Abū Ḥanīfa's contemporary, the judge Ibn Abī Laylā. This was the old-established practice. The other opinion resulted from a religious objection based on the consideration of the dignity of the mosque ...." <sup>106</sup>

Now, the alleged Prophetical ḥadīth for the above question was alluded to by Abū Ḥanīfa, and its content endorsed by Abū Yūsuf in the Kitāb Ikhtilāf Abi Ḥanīfa wa Ibn Abī Laylā (pp.222-3), together with the opposite opinion and practice of Ibn Abī Laylā. Abū Ḥanīfa said: "Punishments should not be applied in the mosque," to which Abū Yūsuf added that "this was received (ruwiya) from the Prophet ..." The actual text of the alleged pericope appeared chronologically as follows:

1. The Prophet said: "Punishments should not be applied in the mosque." <sup>107</sup>

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2. The Prophet had forbidden the application of the flogging penalty in the mosque. (Nahā Rasūl Allāh'an jald al-ḥadd fī al-masjid.) <sup>108</sup>
3. The Prophet had forbidden blood retaliation (yustaḡāda) in the mosque, or recitation of poems, or application of ḥadd punishments. (Nahā Rasūl Allāh an yustaḡād fī al-masājid, wa an yunshad fīhā al-ash'ār aw tuḡām fīhā al-ḥudūd). <sup>109</sup>

Neither Mālik nor Shāfi'ī made any use of these pericopes. This fact, alone, casts doubt on the authenticity of the pericope as it appears in the Ikhtilāf ascribed to Abū Yūsuf. It could have been incorporated later by the copyists or editors.

#### VI. LIABLE TO ISLAMIC LAW

This proviso is meant to reflect the controversy over whether or not non-Muslim are liable to God's laws (Hal al-Kuffār mukhāṭabūna bi al-Sharā'i' am lā?).<sup>110</sup> Non-Muslims (Dhimmis = non-Muslims under the Islamic rule; Mu'āhad = non-Muslims under special pact; musta'mins = non-Muslims with temporary permission to enter or remain in Muslim territories; and Ḥarbi = non-Muslims in a state of war with Muslims) are treated differently according to the attitude of the individual master of each school.

Abū Ḥanīfa and Shaybānī do not impose ḥadd punishment upon non-Muslims when they commit a crime which is purely against religion (ḥaqq Allāh). Hence, since zinā is ḥaqq Allāh, non-Muslims are not susceptible to the ḥadd punishment. However, according to Abū Ḥanīfa, any Muslim (male or female) who has fornicated with a non-Muslim is punishable, for, on the part of the Muslim, the act is pure zinā. Shaybānī, on the other hand, does not punish a Muslim woman on the ground that the prerequisite factor is not susceptible to the ḥadd.<sup>111</sup> Only a Muslim male is punishable by the ḥadd when he fornicates with a non-Muslim female. Ibn Abī Laylā does not distinguish between Muslims and non-Muslims and, hence, all are susceptible to the ḥadd punishment, whether non-Muslim have committed the crime between themselves or with a Muslim partner. To support his attitude, he adduced the story of the Jewish couple.<sup>112</sup> Abū Yūsuf, arguing from a theoretical point of view,

applied the hadd punishment to non-Muslims when they fornicate with a Muslim woman on the ground that non-Muslim persons are required to observe Islamic regulations when they are permitted to enter or remain in Muslim territories. Mālik, like Abū Ḥanīfa, does not punish non-Muslims. Unlike Abū Ḥanīfa, however, he sends them to their religious leaders to be punished accordingly on a bona fide basis. However, if non-Muslims publicize the crime, they are to be given an appropriate punishment (wa yu'āqabūn in a'lanū al-zinā). <sup>113</sup>

Mālik's prominent teacher, Rabī'a b. Farrūkh, known as Rabī'a al-Ra'y for his recourse to speculation (d.136), <sup>114</sup> does not exclude Dhimīs from the covenant ('ahd) to which they agreed. <sup>115</sup>

Shāfi'ī, familiar with these arguments, adopts an attitude of compromise. First, he distinguishes between Dhimīs and Musta'mins: those with a permanent or semi-permanent agreement and those with a temporary agreement, known as safe-conduct (amān). Dhimīs, those with the permanent agreement are at the 'mercy' of the Imāms if the Imām wants to judge them, then he can do so. Furthermore, once the Imām has chosen to judge them, then he has no choice but to apply Islamic Law. This is in accordance with the Quranic verses 5:42, 48-9, as well as with the Story of the Jewish Couple. Hence, not surprisingly, Shāfi'ī ignores Q.5:43: "How can they seek your judgement when they possess the Torah containing the Judgement of God?" which not only does not concur with his arguments as stated above, but, in fact, weakens them. If, on the other hand, the Imām chooses not to judge them, then he should send them to their own religious leaders for judgement. If either the offenders or the religious leaders refuses to comply with the order, then the agreement (Dhimma) is broken and the refusing party should be expelled



from the territory. In the case of the Musta'min, those with a temporary agreement (safe-conduct), the first thing to observe is the nature of the crime involved. Is it a crime against religion (ḥaqq Allāh), against the human being (ḥaqqul ādamī), or against both? If it is purely against religion (no example is provided but presumably this refers to zinā), then the non-Muslim offender (the musta'min) can be forgiven, i.e. not subjected to the ḥadd punishment. But, if the crime is one against human rights, such as defamation of character (qadhf), homicide or injury (al-shajja), then the offender is punishable by the appropriate ḥadd. When the crime involves both issues, (i.e. against both religion and human rights), such as in the case of stealing (al-sariqa), then there are two equally accepted opinions: (1) ḥadd plus a fine as compensation for possessing someone's property, and (2) a fine only because the ḥadd is the right of God.<sup>116</sup> Amongst all these fine distinctions, the proviso of greatest interest to me is the phrase "... can be forgiven" (yajūzu 'afwuhu). This phrase indicates that the issue is left to the discretion of the authority just as in the case of Dhimmīs, but with one slight distinction - in the case of the Dhimmīs, punishment is obligatory, while here lenience is recommended. Much more will be said on the issue of the Dhimmīs and all other non-Muslim offenders when I come to discuss the Ikhtilāf concerning the origin of the Stoning Penalty with reference to the story of the Jewish Couple. Our concern at the moment is with texts adduced for or against the applicability of the ḥadd punishment to non-Muslims. Of all the masters mentioned above, only Ibn Abī Laylā and Shāfi'ī managed to produce textual proofs to support their point of view. This is not to say that the Story of the Jewish Couple was unknown to Abū Yūsuf and Shaybānī, though it is doubtful that Abū Ḥanīfa knew it. Abū Yūsuf adduces the pericope, in this short version, as a classical example of the application of the Stoning Punishment originating from the Prophet in the same manner as the Story of

Mā'iz. <sup>117</sup> Shaybānī, transmits the pericope from Mālik. <sup>118</sup> However, no one has used the pericope to substantiate his argument against the applicability of the ḥadd punishment to non-Muslims. My argument here is that the details and fine points mentioned in the pericope of the Jewish couple, which were later used to show Muḥammad's grounds for punishing the couple, were either added later to fit the arguments of the early masters, or, if they were originally part of the whole pericope, were never exploited or adduced in the time of Abū Yūsuf and Shaybānī.

VII. FREE FROM ALL FACTS OF POSSESSORY RIGHTS AND THEIR AMBIGUITY (SHUBHA); FREE FROM THE RIGHT OF OWNERSHIP (MILK)

This proviso has been used to sweep a considerable number of zinā cases under the carpet on the grounds of existing shubha (ambiguity/resemblance/similarity/confusion/lack of clarity ..). Generated by the legal maxim "Avoid the application of ḥadd punishments as much as possible", the term shubha came to be employed widely, even to the extent of excluding prostitution from the zinā punishment! The arguments presented by a given individual, or on behalf of a given school, are very complicated, boring and sometimes cumbersome. Nevertheless, the common feature is that as long as it is possible (but not certain) to consider that the offender has committed sexual intercourse within the bounds of his legal possessory rights, <sup>119</sup> then the ḥadd punishment should be avoided. Hence, for Abū Ḥanīfa, anal intercourse with one's own wife is not punishable on the ground of existing legal possessory right provided by the marriage contract. Similarly, prostitution - known as sexual intercourse with a woman hired for that purpose - is not punishable by the ḥadd on the ground that the money paid to the woman resembles the dowry paid to a wife (!). Later fuqahā' tried to confine the term shubha to three categories:

1. Shubhat fi'l: Ambiguity with reference to the act, e.g. the culprit does not know whether the act is permitted, or not.
2. Shubhat milk, also known as shubhat ḥill: The co-existence of two contradictory rights to have sex with the female partner, e.g. with a manumitted slave, or with the irrevocably divorced wife (mutallaḡa bā'ina) who is still in her waiting period of four months and ten days.
3. Shubhat 'aqd: Ambiguity arising from an inconclusive marriage contract, e.g. invalid marriage (fāsid) or annulled marriage (bāṭil), respectively. These first two categories are generally accepted by almost all fuqahā'. Abū Ḥanīfa and Zufar alone consider the last category as shubha -strong enough to avoid the ḥadd punishment.

The remaining scholars apply the ḥadd punishment as long as both conditions 1 and 2 are missing. <sup>120</sup> Almost all these hypothetical cases are dealt with under a single legal maxim: "Avoid the application of the ḥadd if there are ambiguities" (Idra'ū al-ḥudūd bi al-shubuhāt ...). The maxim originated in the common slogan: "Restrict the punishments as much as possible." Gradually, however, it was ascribed to the Followers, the Companions and, finally, to the Prophet himself, using the word ".... shubuhāt ..". The ḥadīth soon found its way into the Classical Collections. <sup>121</sup> Some of the hypothetical cases were invested in 'Umar's action. With respect to the property of the descendants and ascendants, i.e. parties hierarchically related to each other, there existed a Prophetical ḥadīth in which a son was alleged to have gone to the Prophet complaining that his father had embezzled his money. To this complaint, the Prophet replied: "You and your property are the property of your father." (Anta wa māluk li'abīk.) <sup>122</sup> This ḥadīth was then used to dismiss sexual intercourse committed by an ascendant with a slave of his

descendant, or that of a descendant with a slave of his ascendant, but not intercourse with a slave belonging to a brother or sister. Similarly, the pericope was applied to the case of a husband who committed sexual intercourse with a slave belonging to his wife.

Having seen the influence of the Ikhtilāf on the ḥadīth literature, let us now see how the Pre-Formative Period masters understood zinā. As I have already said, there is no full and clear definition of zinā from these masters. Thus, any definition provided here is a simple reconstruction of the definition as it might appear in any given work. This is based on the argument presented by the respective authors.

Abū Hanīfa: "It is an act of fāḥisha (vile deed) into the forepart of a female, free from ambiguity, committed in the abode of Justice." 123

Mālik: "It is an unlawful sexual intercourse, by a Muslim, into a forepart of a person with whom it is possible to have sex." 124

Shāfi'ī: "It is sexual intercourse between two persons, without the bond of marriage or any other legal bond." 125

Aḥmad b. Ḥanbal: "It is an act of fāḥisha into the forepart or rear part." 126

Thus is how zinā would have been defined, if one may use the term, by the masters of the Pre-Formative Period and Formative Period. As we have seen, in comparison with the earlier "definitions", fewer and fewer

situations came to be interpreted as instances of zinā, but at the same time, the scope of the more recent definitions was enlarged to cover newly arising situations that had been previously unknown.<sup>127</sup> Both have one thing in common; juridical speculation was almost invariably prior to the proofs adduced to support the claims. One point deserves mention. Of the four masters mentioned above, only two used the term fāḥisha. This term is used in the Qur'ān to denote a vile deed/obscenity in speech or action/crime/sin.... Indeed, Q.17:32 calls zinā fāḥisha. Q.7:80; 27:54 and 29:28 employ fāḥisha for sodomy. Hence Q.4:15, 19, 25 and possibly 3:135 are taken to mean zinā (cf. Q.33:30). But even the old custom of marrying one's father's widow is called fāḥisha (Q.4:22). Unapproved custom (Q.7:28), scandal (Q.24:19) and simple sin (Q.3:135) are also called fāḥisha. Again, because Q.33:30 is generally known to have been concerned with Muḥammad's wives, the exegetes have confined the meaning of fāḥisha therein to "getting out of the house without the husband's permission" and do not include zinā or any other possible meanings. But Q.4:19 and 65:1 are also interpreted as "causing indemnity to fellow wives," etc.

Fāwāḥish = sin/great sins/ and possibly crimes in general, is used in Q.6:151; 7:33; 42:37 and 53:32. Fāḥisha, vile deeds with the collaboration of Satan, is used in Q.2:169 and 2:268. Also, possibly for sexual intercourse in relation to Joseph in Q.12:24.

Now, the term "fāwāḥish", denoting "frequenting prostitutes", occurs in the old usage of Arabia as demonstrated in the account of an interview of Ja'far b. Abī Ṭālib with the ruler of Ethiopia (Najāshī cf. Q.5 pp.38-43). The incident was reported by Ibn Hishām in the sīra.<sup>128</sup>

However, the mention of the word fāhisha in the definition does not necessarily entail borrowing from Scripture. This is particularly true with Abū Ḥanīfa. To begin with, Abū Ḥanīfa hardly used Scripture or Prophetical ḥadīth, as a matter of principle. Secondly, he would not use the word fāhisha to embrace a large area of zinā. We have seen him narrowing the meaning of zinā to the extent of excluding prostitution. Furthermore, sodomy is not zinā to Abū Ḥanīfa. Yet the Qur'ān calls on both zinā and sodomy by the word fāhisha, which it also uses to refer to other crimes. Given his narrow view of zinā, if Abū Ḥanīfa used the term fāhisha at all, then I can think of only two possibilities. Either he deliberately used the term because of its ambiguity in order to dismiss many cases on the basis of the maxim: "Restrict punishments as much as possible", in which case Quranic borrowing is not possible, or he used the term for reasons of modesty or common usage. As for Aḥmad b. Ḥanbal the borrowing is possibly clearer than in the former case. Aḥmad exhibits a tendency to use Scriptural phrases, whether Quranic or Prophetical, as often as possible. Unlike his predecessors, he was compelled to do so by the circumstances of his time.<sup>129</sup> Furthermore, unlike Abū Ḥanīfa, Aḥmad considers Sodomy of all sorts, as well as bestiality (according to his favoured opinion) to be punishable by the ḥadd. Indeed, he transmits several ḥadīths to that effect. In fact, the entire definition of Aḥmad, provided by al-Khiraqī is replete with scriptural phrases: Ityān al-fāhisha (cf. Q.7.80, 81; 27:54; 29:29., which are traditionally taken to mean sodomy; and Q.4:25.16 and 15, to mean adultery or fornication), dubur/gubul (cf. Q.12:25; 12:27; 12:28 and 12:26), and finally, a Prophetical ḥadīth concerning Ityān al-nisā' fī adbārihinna (see above p.2//). Hence, it is only Aḥmad b. Ḥanbal who, understandably, employed fāhisha not only for its purely ambiguous nature, but also for the sake of using scriptural phrases and for juridical reasons.

However, there was an effort during the Classical Period to produce an "authentic" definition of zinā, going back to the Prophet himself. One version of the Mā'iz story runs as follows:

...هل تدري ما الزنا؟ قال نعم. أتيت منها حراماً ما يأتي الرجل من امرأته حلالاً. قال فما تريد بهذا القول؟ قال أريد أن تطمئن ...

.... the fourth time the Prophet asked him: "Do you know what zina is?" "Yes," replied Mā'iz, "it's to have unlawful sexual intercourse with a woman, which, had it been between a husband and his wife, would have been legal sexual intercourse (ḥalāl) ..." <sup>130</sup>

This version occurs only in the recension of Abū Dāwūd under: Kitāb al-Hudūd, Chapter 23. However, there were already Prophetical hadīths which considered Sodomy to be zinā, while others took the opposite view. <sup>131</sup>

This long and tiresome chapter demonstrates one thing. Although zinā was and is a major issue in Islamic Law, the jurists have not agreed among themselves as to what is and is not zinā. Unless one is ready to follow a particular school or a specific jurist, one finds that zinā is a crime which exists only in the law books. This does not mean that Muslim jurists do not admit that adultery exists - they do - they do NOT favour the application of the ḥadd.<sup>132</sup> Their reluctance was primarily generated by the general maxim: "Avoid the punishments (as much as possible) where the matter is questionable."

إدروا الحدود (ما استطعتم) بالشبهات .

<sup>133</sup> إادفعوا الحدود ما وجدتم له مدفعاً .

## CHAPTER IX

### SHAHĀDA

Having discussed which acts are susceptible to the hadd punishment of zinā according to different law specialists, I shall now concentrate on the means by which zinā can be established before consideration of the appropriate hadd can arise.

There are three ways of proving zinā.

- 1- Shahāda = testimony
- 2- Iqrār = confession and
- 3- Habal = illegitimate pregnancy. <sup>1</sup>

Shahāda, the testimony of the witnesses (shāhid, pl. shuhūd) is one of the two forms of evidence unanimously agreed as the only convincing and valid proof for zinā. The other proof is the iqrār. There is a wide disagreement as to whether or not habal is a sufficient proof for the application of the hadd unless it is proved otherwise by the culprit herself. <sup>2</sup> This together with the iqrār are to be treated separately later. Here our concern is the shahāda.

Depending on the nature of the crime, the rules and procedures for both the testimony and the testifiers differ. In some cases, particularly in respect of zinā, the rules and procedures emphasized by the fuqahā', regardless of their diversity, exhibit a greater concern to observe certain formal religious recommendations for their own sake than to establish facts. <sup>3</sup> Yet, the hard-line attitude for adopting stringent demands in order to accept an eye witness account as evidence with respect of zinā shows, unsurprisingly, a great interest in



restricting application of the hadd as much as possible; for not only does the increase in the number of the shuhud to the four witnesses demanded for zinā accusation provide no strength to the evidence against the culprit, but even a small, and sometimes unimportant, deviation by one member of the shuhūd might be, as we shall see, a sufficient legal ground to reject the whole evidence and to acquit the culprit. <sup>4</sup>

#### RULES AND PROCEDURE FOR THE SHAHADA

It is generally agreed that the evidence of the shahāda for zinā accusation must be produced by four persons of good character, expressed as: ‘udūl. <sup>5</sup> But strictly speaking, that is the extent of the agreement. Who is eligible for that privilege, how, when and where his evidence must be given, are, among other things, the matters of dispute among the fuqahā.

Now, there are general rules for the shahāda applicable in all cases as well as additional rules specifically demanded for zinā accusation. Since that is the case, I will consider the general rules in as much as they are relevant to the zinā accusation before concentrating on the additional rules required specifically in zinā cases.

In order to be eligible to give evidence in zinā cases, the witness must possess the following qualities:

- I. Maturity (al-bulūgh)
- II. Sanity (al-‘aql)
- III. Good character (al-‘adāla)
- IV. Islām

- V. Competence for testifying (al-qudra 'alā adā'i al-shahāda) i.e. memory (al-ḥifẓ), speech (al-kalām) and sight (al-ru'ya);
- VI. Lacking all obstacles (intifā' mawānif al-shahāda) i.e. kinship (qarāba), enmity ('adāwā) and suspicion of personal gain (tuhma). These qualities are known to be general demands in all cases.

In addition to these qualities there are special qualities demanded in zinā cases. There are:

- VII. Four witnesses (arba' shuhūd);
- VIII. Male (al-dhukūra)
- IX. Liberty i.e. status as free man (al-ḥurriya);
- X. Primacy i.e. originality (al-aṣāla);
- XI. Absolute agreement (ittifāq al-shahāda);
- XII. Single presence (ittiḥād al-majlis);
- XIII. Lack of elapse of time ('adam al-taqāḍum).<sup>6</sup>

With the exception of I., II., III., VII and possibly XI, the fuqahā' disagreed among themselves.

As can be seen, the subject is intricately difficult and exceedingly complicated. Needless to say, to follow every single argument presented by the Pre-Formative and Formative Period masters, on every given issue above, will not only lead us nowhere, but will also take us away from our main concern. Hence, only those issues relevant to our discussion will be treated fully.

As far as the so-called "general rules" are concerned, the kernel of the problem seems to center on the question: whether or not the crucial factor for eligibility in giving valid evidence should depend primarily on the time of giving evidence and not on the time of witnessing the event for which the evidence is given, or whether both situations must be taken into the consideration. Depending on the attitude of individual fukahā, whether in term of different regions or from within one region, a considerable amount of Ikhtilāf has been recorded. The issue came to be known as: ahliyat al-shahāda waqt al-'adā, i.e. eligibility at the time of testifying, or: ahliyat al-shahāda waqt al-taḥammul. i.e. eligibility at the time of witnessing. Those who depended on the latter alone rejected the evidence of minors, blind persons, sinners, non-Muslims, interested parties (i.e. for personal gain, enmity etc.) and of a slave. This is the doctrine ascribed to masters of those two periods. A list of not unimpressive names appears in the Mudawwana, such as: Shurayḥ, 'Abd Allāh b. 'Urwa b. al-Zubayr, Ibn Qusayṭ, Abū Bakr b. Ḥazm and Rabī'a.<sup>7</sup> These are the names of Pr.F.P. scholars who accepted the evidence of minors among themselves, provided they gave identical evidence before leaving the scene of the crime and before their personal contact with their parents.<sup>8</sup> The same view is ascribed to Ḥasan al-Baṣrī (d.110) Sha'bī (d.100)<sup>9</sup> and Ibn Abī Laylā<sup>10</sup> (d.148). Abū al-Zinād (d.130) is made to comment: "...that is the Sunna."<sup>11</sup> Nakha'ī is reported to have added: "They used to accept the evidence of minors among themselves." Ibn Mahdī (Mālikite scholar) (d.197) comments: "But Ibrāhīm (Nakha'ī) rejected their evidence against mature persons."<sup>12</sup> This comment of Ibn Mahdī signifies that the above masters or some of them, did accept minor's evidence against mature persons.<sup>13</sup>

Shāfi'ī, who endorses the attitude of Abū Ḥanīfa, Abū Yūsuf, Shaybānī, Ibn Shubruma (d.144) and Thawrī (d.161), adduces Q.2:282: ".....and seek the evidence of two witnesses from your men. In the absence of two men, then a man and two women among those with whom you are pleased with as witnesses", to reject the evidence of minors on the ground that minors are not like the men mentioned in the verse, nor are they among those whom "we are pleased with their evidence." <sup>14</sup>

Anticipating an objection on the ground that Ibn Zubayr had accepted the evidence of minors, Shāfi'ī rejects the idea of saying: ".... but Ibn 'Abbās had rejected minor's evidence, and the Qur'ān shows that minors are not among those with whom we are pleased." <sup>15</sup>

Nearly similar arguments and similar techniques were employed by the masters of these two periods to accept or reject the evidence of a non-muslim, a blind person, suspect witnesses and slaves. All these cases were rejected by Shāfi'ī on similar grounds to those employed for the rejection of the evidence of minors. <sup>16</sup> However, none has managed to produce a Prophetical ḥadīth as a textual proof for his argument. The only Prophetical ḥadīth which was known, or at least adduced, by some masters of that period is the ḥadīth of Ibn 'Umar in which he is reported to have said: "I was presented to the Prophet, when I was fourteen years old, in order to participate at the Battle of Uḥud, but the Prophet turned me away. Then I was presented again to the Prophet, when I was fifteen years old, to participate in the Battle of the Ditch (al-Khandaq) and the Prophet allowed me to take part." <sup>17</sup> Abū Yūsuf takes this pericope on the difference between a minor and adult with the comment: "... This is the best of all that I have heard ....." <sup>18</sup>

Now, so far I have concentrated briefly on the validity of the evidence of minors, blind persons, non-muslims and slaves. I will return to some of these cases later on, when I come to talk about the special demands or rules for the evidence of zinā. Here I would like to return to the problem of the validity of the evidence with respect to its chronological limit.

As has already been pointed out, the doctrine came to be known as whether the eligibility of evidence should primarily depend on the time of witnessing the event on which the evidence is given or on the time of testifying or both.<sup>19</sup> A typical hypothetical case involved here is: suppose a man has given evidence of the zinā act which he had witnessed when he was a minor, is his evidence valid or not valid? Those who accept the evidence of minors would have no problem in accepting his testimony at maturity, although some objection could have been raised with reference to the validity of evidence after a considerable delay known as: 'adam al-taqādum.<sup>20</sup> However, those masters who rejected the evidence of minors because of their ineligibility at the time of witnessing had to face new hypothetical problems such as the one of the minor who had meanwhile become mature. Here, the doctrine of ahliyyat waqt al-tahammul or ahliyyat waqt al-ada', was put into practice.

In Irāq, the doctrine was connected with a minor who became mature, a slave who was later manumitted and a Jew or Christian who later embraced Islām. In all these cases the evidence of each is valid provided that at the time of testifying they were eligible for testimony.<sup>21</sup> However, only Abū Yūsuf and Shaybānī followed Nakha'ī's doctrine. Abū Ḥanīfa rejected the idea on the ground that the testimony

given by each is about an event which had occurred at a time when they were ineligible to give evidence. <sup>22</sup> Consequently, he rejected the evidence of a man who prior to offering his testimony became blind.

In the Ḥijāz, a similar attitude existed but with a different origin. Their authority is the sunna (practice) of ʿUthmān b. ʿAffān (the Caliph). <sup>23</sup> However, Ibn Shihāb, who transmits the incident from Ibn Musayyib, rejects the evidence of a non-muslim. <sup>24</sup> Mālik accepts the evidence of the blind if the impediment occurred after witnessing the event. <sup>25</sup> Shāfiʿī takes a similar view attributed to ʿUthmān, though he never mentions ʿUthmān as his authority but employs his own systematic reasoning. <sup>26</sup> Ibn Ḥanbal is reported to have taken a similar view to that of Shāfiʿī. However, he is also reported to have accepted the evidence of a minor who had reached the age of 10 years. <sup>27</sup>

Ṭaḥāwī, a Ḥanafite scholar (d.321) reports that: "Anas b. Mālik had said: 'I know of no one who rejected the evidence of slaves.'" <sup>28</sup> Nevertheless, it was Ibn Taymiyya (d. 728) and Ibn Qayyim (d.751) who accepted the evidence of a non-muslim against a Muslim in all cases when the conditions or circumstances dictated accepting their evidence, i.e. ʿinda ḡarūra'. <sup>29</sup> This position was reached on the basis of qiyās; for the evidence of non-muslims is accepted in testamentary cases during a journey when there is no Muslim available. <sup>30</sup> "Similarly," Ibn Taymiyya argues, "the evidence of a non-muslim against a Muslim under such conditions is valid." <sup>31</sup> In addition to that, he accepts the evidence of non-muslims among themselves on the basis of "general interest and fair play." <sup>32</sup> Needless to say, up to and including the time of Shāfiʿī no single Prophetical ḥadīth was adduced to support any issue on the so-called general demands for the Shahāda. The Pre-Formative Period masters depended on personal opinion to introduce laws. Shāfiʿī

employed similar techniques, but whenever it was possible to adduce a Quranic verse he wasted no time in doing so. Nevertheless, some Prophetical ḥadīths which affect some of the demands mentioned earlier did exist at the time of Abū Dāwūd (d.275). In the Book of Qaḍā' (judicature) bāb man turadd shahādatuh:

The Prophet had turned away the evidence of the khā'in and khā'ina

(disloyal/faithless/false/unreliable/traitorous/perfidious etc.); the evidence of a personal with personal enmity (dhū ghamrin 'alā akhīh); and the evidence of the helping hand for the people of the household (wa shahādatal-qāni' li ahl al bayt) but accepted it (i.e. their evidence) against, or for, others. 33

Ibn Māja knows a Prophetical ḥadīth which runs as follows:

The Prophet had permitted the evidence of the people of the Book against one another. 34

Prior to Ibn Māja, Tirmidhī transmitted a similar ḥadīth with slight, but not uninteresting, variations. In the Chapter of Evidence (Shahādāt), the Prophet said:

The evidence of the following people is not permitted: the khā'in and khā'ina; he who had been flogged for punishment; he who is known to have personal enmity; he who is known to have given false evidence; and a lodger in favour of the people of the household.

As usual Tirmidhī provides his comment: "This ḥadīth could not possibly be authentic owing to deficiency in the chain of the transmitters." <sup>35</sup>

It should be noted that two types of people whose evidence is to be rejected according to Tirmidhi's version are not included in Ibn Māja's version. These are a person who had been flogged for punishment and a person who is known to have given false evidence in his life. Both have one thing in common. Their previous history is known to be stigmatized by telling lies. Hence, it was logical to reject their evidence. However, because the isnād is unsound, Tirmidhi rejects the ḥadīth. This is not an unimportant gesture; for Tirmidhī, as far as I understand, hardly rejects a ḥadīth purely for deficiency of the isnād. My own assessment is that the credentials of the two classes of people mentioned only in Tirmidhi's version were the subject of the Ikhtilāf of the Pre-Formative and Formative Periods masters. None of them however, had managed to produce a Prophetical ḥadīth to back up his arguments. Tirmidhi's version must be the earliest attempt to enshrine the opinion of those who rejected forever the evidence of a person who had been flogged for qadhf - slandering -and of a person who had a bad reputation in giving evidence. This was the doctrine of Abū Ḥanīfa and Shaybānī, as opposed to the doctrine of Mālik and Shāfi'ī. The latter accepted the evidence of those people after their (tawba) repentance. <sup>36</sup> Having in mind this problem and realizing that none of the foregoing masters had managed to produce a Prophetical ḥadīth to support his view, and taking into consideration the history of Yazīd b. Ziyād a transmitter of the above ḥadīth, Tirmidhī had no alternative but to reject the pericope. When the problem was edited in Ibn Māja's version, and was provided with



a new isnād, Ibn Māja accepted the pericope as a genuine Prophetic hadīth. Indeed, all post-classical Ḥanafite fuqahā' adduced Ibn Māja's version to support their case against Mālik and Shāfi'ī. <sup>37</sup>

On similar grounds the early fuqahā disagreed upon the evidence of a sinner (fāsiq). Most of them rejected the evidence of a sinner. Abū Yūsuf, however, accepted the evidence of a fāsiq provided he is a prominent member of society (wajīhan), very respected (dhū muruwwa) and is known for not telling lies because of his social position (yamtanī'an al-kadhib bisabab wajāhatih). <sup>38</sup>

Shāfi'ī accepts the evidence of a sinner only after his repentance. "This", Shāfi'ī argues, "is in accordance with the Q.24:4,5." I will have more to say about these two verses later. First, I would like to look at those rules which are demanded for zinā cases.

#### VII. FOUR WITNESSES

Most of our sources, from Shāfi'ī onwards, adduces the following texts as the proofs for demanding four witnesses in the zinā accusation:

والتى يأتين الفاحشة من نسائكم فاستشهدوا عليهن  
أربعة منكم فإن شهدوا فأمسكوهن فى البيوت حتى  
يتوفاهن الموت أو يجعل الله لهن سبيلاً

If any of your women are guilty of lewdness/obscenity -  
fāḥisha -take the evidence of four witnesses from amongst

you, against them. And if they testify, confine them to their quarters until Death do claim them, or God ordains for them some (other) way.

Q.4:15

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء  
فاجلدوهم ثمانين جلدة ولا تقبلوا لهم شهادة أبداً  
وأولئك هم الفاسقون . إلا الذين تابوا من بعد ذلك  
وأصلحوا فإن الله غفور رحيم  
فأولئك عليه بأربعة شهداء فإدلم يأتوا بالشهداء  
فأولئك عند الله هم الكاذبون .

And those who launch a charge against chaste women and produce not four witnesses, flog them eighty lashes and reject their evidence ever after; for such men are wicked transgressors. Unless they repent thereafter and mend (their conduct); for God is Often-Forgiving, most Merciful ..... they should bring four witnesses to prove it, if they do not bring the witnesses, such men, in the sight of God, are liars!

Q.24: 4,5,13.

and second the hadith: "Sa'd b. 'Ubada went to the Prophet and said: 'Suppose I found my wife with a man (committing adultery) do I have to wait until I find four witnesses (i.e. before taking any action)?' "Yes" the Prophet replied". Another hadith states: "Hilal b. Umayya went to

the Prophet and accused 'Āṣim of fornicating with his wife. The Prophet said to Hilāl: 'Unless you bring four witnesses to back up your accusation, the ḥadd punishment will be inflicted.'" <sup>39</sup> These three Quranic verses together with the ḥadīth of Hilāl b. Umayya and that of Sa'd b. 'Ubāda came to be the locus classicus for demanding four witnesses.

Now we have no clear evidence that Abū Ḥanīfa adduced any of the above textual proofs and justification for the demand of four witnesses in zinā accusation. Yet, to him, and to the rest of the fuqahā, the evidence of four witnesses is an absolute necessity in the absence of self-confession. <sup>40</sup> However, it is not impossible that Abū Ḥanīfa based his demand on one of the Quranic verses mentioned above, although this kind of practice is rare for him. If that is correct then it must be Q.24:4; owing to its involvement in the story of the great lie (the ḥadīth al-ifk), associated with Muḥammad's wife - 'Āisha - as it was reported by Ibn Ishāq (d.151). <sup>41</sup> By that time the story of the Ifk and its association with the above Quranic verse was perhaps familiar. Abū Ḥanīfa's deductive conclusion might be that since Q.24:4 demanded four witnesses in order to avert the punishment of eighty lashes from the accusers, the production of four witnesses must be taken to be the condition for establishing zinā accusation. It might not follow logically but that is how even later specialists viewed the problem. The argument would seem to depend on a general principle that: "He who denies not the charges thereby admits his guilt." But one may contradict this principle by stating that: "Silence does not necessarily entail submission to, nor denial of the charges." Yet, the fuqahā themselves are of the general opinion that once the accuser manages to produce another three witnesses to back up his allegation the accused is punishable by the ḥadd and his denial will be inadmissible. Furthermore, he will have

no right to appeal. This is the deductive conclusion of the fuqahā before and after Abū Hanīfa. However, those who came later managed to produce textual proofs to back up the argument.

Now it is generally agreed that qadhif is different from the zinā accusation proper. The former is always taken to be a false accusation, whose main object is to disgrace or stigmatize the honour of a chaste woman. Thus, it is always expressed in the fiqh books in the form of pronouncements such as yā zānī, yā zāniya, or fulān zānī or zāniya, etc.<sup>42</sup> Even the story of the Ifk, which is considered to be the first case, and the origin of or the reason for qadhif in Islām, does not give an impression other than that those who accused ʿĀisha only slandered her.<sup>43</sup> Moreover, the stipulations and conditions demanded by the fuqahā in qadhif cases are different from those of the zinā accusation proper. For instance, if someone slandered a prostitute, or castrate (majbūb) or hermaphrodite (khunthā) he is not qādhif, because none of these people's honour is disgraced.<sup>44</sup> Whereas if any one of these people were accused properly of zinā, three extra witnesses would be required to prove the allegation. *will turn into qadhif. Thus, qadhif is not zinā* Failing to do so, the accusation, unless it was expressed in terms of zinā accusation, such as: "I have seen so and so committing adultery." Once, the allegation is produced in those terms then the demand for another three witnesses will arise. But when the allegation is produced in accusation form it is no longer false accusation. It is proper zinā accusation, though it will not be valid until it is backed by another three witnesses.

Now, the reason for equating qadhif, expressed in Qurʾān 24:4 and 5, for that matter, with zinā accusation proper is that the early fuqahā, particularly Abū Hanīfa knew no other textual proof for the demand of four witnesses in zinā accusation proper. Unlike Abū Yūsuf, Shaybānī,

Mālik and Shāfi'ī, who had different proofs for the demand of four witnesses in zinā accusation proper, Abū Ḥanīfa and those before him had to make good use of whatever was available to them. The only proof they could lay hands on was the story of the Ifk together with the Q.24:4 traditionally associated with the Ifk. By the time of Abū Yūsuf, attempts at producing other textual proofs were already underway. Providing his conditions for the witnesses of zinā, Abū Yūsuf says:

If four males, all of whom are Muslims, free-men and of good character, testified explicitly against another person for having committed adultery .... then the Imām should give his orders to stone the accused to death. I was told by Mughīra, on the authority of Sha'bi who said: 'The Jews said to the Prophet: What is the punishment of stoning to death for? The Prophet replied: If four people testified that they had seen the accused committing adultery like the kohl stick entering into the bottle then the punishment of stoning to death should be inflicted upon the accused." ..... anna al-Yahūd qālū li-nabi 'alayhi al-ṣalāt wa al-salām mā ḥadd al-rajm? Qāl: idhā shahida arba' annahum ra'awhu yadkhul kamā yadkhul al-mīl fī al-mikhāla fa qad wajaba al-rajm."<sup>45</sup>

This then is the source of demanding 4 witnesses in zinā accusation proper as far as our sources are concerned in the fiqh literature. According to the sīra, the story appeared first in the work of Ibn Ishāq - the Maghāzī - preserved by Ibn Hishām in the Sīra.<sup>46</sup> There, the detail of the kohl stick was not mentioned, nor Muḥammad's reply to the question of the Jews in Abū Yūsuf's version. No one incorporated fully Abū Yūsuf's version until the time of Abū Dāwūd (d.275). The story was reported fully by Ṭabarī (d.310).<sup>47</sup>

Now, by the time of Shāfi'ī, who presumably disliked the idea of connecting the issue with the story of the Jewish couple and hence disregarded Abū Yūsuf's version, that is if he knew it, new Prophetical ḥadīths were available. Providing the textual proofs for demanding four witnesses in zinā accusation, Shāfi'ī presents his case as follows:

Chapter: Evidence in zinā

With respect to the slanderers God has said: 'Unless they bring four witnesses; If they do not bring witnesses, they, in the sight of God, are liars! Q.24.13. Therefore, there cannot be accepted in zinā accusation less than four witnesses. This is in accordance with the judgement of God and then of his Prophet .... I was told by Mālik by Suhayl from his father on the authority of Abū Huraira that Sa'd b. 'Ubāda said to the Prophet: 'Suppose I found my wife committing adultery with another man, should I leave him alone until I manage to find four witnesses? "Yes," the Prophet replied ... I was told by Mālik from Yaḥyā b. Sa'īd on the authority of Ibn Musayyib who said: 'A man - in Syria - found his wife committing adultery with another man. The husband killed the man, or killed his wife. Mu'āwiya wrote to Abū Mūsā al-Ash'arī asking him to seek 'Alī's advice. He did. But 'Alī said: This could not happen in my territory, Irāq! I swear to God, you should tell me where it did happen? So Abū Mūsā revealed to 'Alī the whole thing. 'Alī said: 'I, the father of Ḥassan, unless the man brings four witnesses let him be led to the family of the deceased for revenge! <sup>48</sup> (... in lam ya'ti bi arba' shuhudā' fal yu'tā bi rummatihi)."

Shāfi'ī presents his textual proofs elsewhere systematically. In the chapter of Evidence (Shahādāt) he provides his textual proofs as follows:

"Q.24:13, followed by Q.4:15 then Q.24:4. The sequence then is followed by the story of Sa'd b. 'Ubāda." Then Shāfi'ī says:

The Book and the Sunna show that there cannot be accepted in the zinā accusation less than four witnesses. The Book shows that the only valid evidence is that of the ‘adl witness, and the Ijmā‘ proves that the only accepted evidence is that of a man of good character, free, mature, of sound mind and aware of what he is testifying for.<sup>49</sup>

Thus the source of demanding four witnesses is the Qur‘ān and the Sunna of the Prophet. The inclusion of Q.4:15 (If any of your women are guilty of lewdness, take the evidence of four witnesses from amongst you against them; and if they testify, confine them to their quarters until death do claim them or God ordain for them some (other) way) is very significant indeed. Shāfi'ī is the first person to employ it for that purpose. In Tafsīr literature, the verse is claimed to be abrogated by Q.24:2 "The adulterer and adulteress flog each of them with a hundred lashes."<sup>50</sup> It was Jaṣṣāṣ, (d.370) who realized the confusion or objection which could have arisen to the attitude of continual employment of Q.4:15, from Shāfi'ī onwards despite its status of being abrogated, tried to clear away any doubt. He argued: "It is true that Q.24:2 had abrogated Q.4:15, but not the whole verse. It's only the "house arrest" mentioned in the verse. The shahāda portion is still valid."<sup>51</sup> ونسخ جميع ما ذكر في الآية، إلا ما ذكر من استشهاده أربعة شهود فإن اعتبار عدد الشهود باق...

Now the story of Sa'd b. 'Ubāda was transmitted by Bukhārī: Salāt 44; and Sūra 24:1,2; Muslim: Li'ān, H.1, 3,10,14, and 17; Dāwūd: Talāq: 27; Dārimi: Nikāḥ: 37 and 39; Mālik: Aqdiya: 17, Hudūd: 7 (cf. also 9 in which 'Umar did not act in accordance with the story of Sa'd b. 'Ubāda and Ḥanbal. vol.2, p.19.

The story of Mu'āwiya and 'Alī is transmitted by Mālik alone, from whom Shāfi'ī had heard it. It is transmitted verbatim in Aqdiya 18.

The story of the Jewish couple which says: " ..... and the Prophet called for four witnesses to come forward to testify against the couple ..." was transmitted by Dāwūd: Hudūd: 25 and 65. This is an improved version of Abū Yūsuf in the Kharāj. Dāwūd also transmits the same pericope but it is the Jews, this time, who informed Muḥammad about the procedure of evidence. This pericope is incorporated in the Hudūd. 25. Ibn Ḥanbal, before A. Dāwūd, transmitted a similar version in vol. 1.p.54. I assume that Ibn Ḥanbal received the pericope from similar circles to those of Abū Yūsuf. The same source could have been the source of Ṭabarī, as much as Abū Dāwūd, the pupil of Aḥmad b. Ḥanbal.

By the time of the Post-Classical fuqahā, the above textual proofs were adduced arbitrarily to show that the demand of four witnesses in zinā accusation was introduced by the Qur'ān, the Prophetical Sunna and the implementation of the Companions such as 'Alī. Those Quranic verses, which were originally associated with qadhif as false accusation, lost their original function. Giving evidence in zinā became qadhif until the completion of four witnesses. Needless to say, the maxim of restricting hadd was put into operation effectively.

مادروا الحدود (عن المسلمين) ما استطعتم



## VIII. MALE STATUS

Almost all fuqahā are of the opinion that all members of the shahāda in the zinā must be male.<sup>52</sup> As far as the Pre-Formative period masters are concerned the exclusion of women is based on the common practice expressed as sunna. The account was first transmitted by Abū Yūsuf who said: "I was told by al-Ḥajjāj that Zuhri said: 'It has been a custom from the time of the Prophet to the time of his two successors, to reject the evidence of women in ḥadd punishments!'"<sup>53</sup> Mālik said: "Women's evidence is not permitted at all except where God has allowed them to give evidence, such as debts, or in disputes to which no one but women can have access."<sup>54</sup> Ibn Wahb (d.197) states that this is also the doctrine of Ibn Shihāb al-Zuhri, Ibn Musayyib, Rabī'a, (d.136) Makhḥūl (d.118) and Nakha'ī.<sup>55</sup> However, Ibn Wahb states that: 'Uqayl (d.141) who is the immediate transmitter from Zuhri, omits the words "...to the time of his two successors ..." because the phrase is not part of Zuhri's words."<sup>56</sup> Trivial as it may seem, the phrase had a tremendous effect; its inclusion meant that the practice was broken by the Caliphs after 'Umar and hence the ijmā'-consensus -claimed by Shāfi'ī, on the above issue, as we shall see later, would fall. This, perhaps, is why Shāfi'ī, who presumably knew the pericope, did not include it in his argument against women's evidence in the zinā accusation.<sup>57</sup> Instead, he concentrated on a systematic argument for the exclusion of women in giving evidence other than in those two cases mentioned above by Mālik.<sup>58</sup> Apart from female matters, such as giving birth, women cannot give evidence alone. Furthermore, whenever they are allowed to give evidence alone. Furthermore, whenever they are allowed to give evidence, two women take the place of one man and should be backed up by a man. This is in accordance with the Q.2:282. (... And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses; so that if one of them

errs the other one can remind her ...) - known as the āyat al-dayn. Shāfi'ī goes on to say: "Thus the evidence of women can be accepted in commercial matters on the basis of the qiyās in the āyat al-dayn. Furthermore, their evidence must be backed up by a male.<sup>59</sup> He concludes by saying: "I know no one of the well informed people who disagreed with the opinion that: no one can testify for the zinā but men."<sup>60</sup> (.... thumma lam a'lam ahadan min ahl al'ilm khālaḥ fī an lā yajūz fī al-zinā illa al-rijāl ...).

Now, this claim, in Shāfi'ī's language, is ijmā'; for the lack of objection from the specialists is taken to mean general consensus. However, the pericope of Zuhri, transmitted by Abū Yūsuf, indicates the opposite. Nevertheless, neither Abū Yūsuf nor any author of the Pre-Formative Period or Formative Period mentions the names of those who were in favour of women's evidence in the zinā. In fact, Ibn Wahb's version shows an attempt to eliminate that possibility. It was Ibn Qudāma (d.620) who came to mention two names of the Pre-Formative Period, who were in favour of women's evidence in the zinā.<sup>61</sup> These are, 'Atā' (d.110) and Ḥammād (d. 120), both Meccan authorities who were almost contemporaries of Zuhri (d. 124) the authority of Medina. However, Ibn Qudāma concludes by saying: "... but the attitude of 'Atā' and Ḥammād is odd, hence it should not be taken seriously." (wa hādha shādhdhun la yu'awwal 'alayhi).<sup>62</sup> Ibn Ḥazm (d.456), who reported the opinions of all the foregoing masters in respect of the evidence of women, attacked severely those who had rejected women's evidence. His main criticism is that no one has ever managed to produce a decisive textual proof (naṣṣ) for the exclusion of women's evidence other than personal opinion. He concludes by accepting women's evidence as sub-ordinate to men's evidence in every case. The only condition is that two females should take the place of two males.<sup>63</sup>

## IX. LIBERTY, I.E. STATUS AS FREE-MAN

This is another condition which has no Prophetical ḥadīth or clear Quranic verse to depend upon. All arguments presented by the fuqahā are based on personal opinion or personal interpretation.

All leading fuqahā of the four schools reject the evidence of slaves.<sup>64</sup> However, only Shāfi'ī adduces Q.2:282 as his basis. His argument is that: "Slaves, like minors, are not among those people with whose evidence we are pleased. 'God', Shāfi'ī argues, 'has commanded us to seek the evidence of those with whom we are pleased'. None of us is pleased with the evidence of slaves, whose affairs are always in the hands of their masters."<sup>65</sup> However, Ibn Ḥanbal, as usual, is reported to have taken two contradictory positions. In his second opinion, he is reported to favour the evidence of slaves because of the general meaning of Q.24:4.<sup>66</sup>

Bukhārī, who favours the evidence of slaves, lists several names which were in favour. These are, Anas b. Mālik, Shurayḥ, Zurārā b. Awfā (qāḍī at Baṣra) Ibn Sīrīn (d.110) and Ḥasan al-Baṣrī.<sup>67</sup>

Looking at these names provided by Bukhārī, it seems that the Baṣrans, in general, were in favour of the evidence of slaves, while Kūfans, and Hijāzis did not accept it. Whether this was conditioned or influenced by the slaves' situation at those centres is not clear but not impossible.

X. PRIMACY OR ORIGINALITY

The doctrine is known as al-aṣāla. This condition was primarily laid down by Abū Ḥanīfa, who did not accept secondary witnesses on behalf of the primary witnesses. Similarly, he rejected indirect evidence in the form of a note from a qāḍī to another qāḍī in zinā cases.<sup>68</sup> This is known as kitāb al-qāḍī ilā al-qāḍī. The first person to reject secondary witnesses is claimed to have been Nakha'ī (d.95/98).<sup>69</sup> His doctrine was endorsed by Abū Ḥanīfa on the ground of shubha; secondary witnesses are not testifying about the actual event but about the testimony of those who witnessed the event.<sup>70</sup> Mālik, less a theorist than Abū Ḥanīfa, accepted both doctrines.<sup>71</sup> Shāfi'ī, like Mālik, accepts both doctrines on the ground that testimony is one of the two means of establishing zinā. Hence, if original witness/s gave his or their evidence in front of other people and then failed to appear before the qāḍī on legal grounds there is no reason why those who had heard him giving his evidence should not be allowed to come before the qāḍī and say: "I testify that I have heard so and so saying such and such a thing."<sup>72</sup> On similar grounds, a document or a copy of evidence (deposition) from a qāḍī of one district to another qāḍī of another district, where, for instance, the culprit, resides, is valid.<sup>73</sup> Ibn Ḥanbal followed the doctrine of Abū Ḥanīfa.<sup>74</sup>

As can be seen, no single hadīth, Prophetical or otherwise, has been adduced to support any argument above.

XI. ABSOLUTE SAMENESS, I.E. VERBATIM EVIDENCE (OR AGREED EVIDENCE)

This is one of the few conditions upon which there is some sort of general agreement among the fuqahā. However, they disagreed on what is to be done about witness whose testimony differs in some details from the testimony of the rest of the witnesses. The majority of the fuqahā are of the opinion that the culprit is saved from the ḥadd punishment, and the three witnesses are to be flogged 80 lashes for qadhḥ <sup>75</sup> The Pre-Formative Period masters knew no authority on which to base their arguments. However, the Post-Classical masters knew a non-Prophetical ḥadīth which imposed the punishment of qadhḥ upon the remaining witnesses. This is an incident ascribed to ‘Umar the Caliph concerning Mughīra b. Shu‘ba, the Umayyad governor in Irāq. The episode runs as follows:

Nāfi‘ b. al-azraq, Shibl b. Ma‘bad, Abū Bakra and Ziyād b. Abīh went to ‘Umar in Medina and accused Mughīra, who was in Irāq as amīr of ‘Umar, for having committed adultery with a maiden in the town. ‘Umar summoned Mughīra to Medina. When he arrived, ‘Umar asked the accusers to give their evidence. The first three gave similar evidence. ‘Umar was irritated and felt embarrassed to see a Companion of the Prophet being accused of adultery. He stood up and prayed to God not to embarrass His

Prophet's Companions. After that ʿUmar said to Ziyād: What have you seen? Ziyād replied:

رَأَيْتُ أَقْدَامًا بَادِيَةً وَأَنْفَاسًا عَالِيَةً وَأُمْرًا مَنَكْرًا  
رَأَيْتُهُمَا فِي لَحَافٍ وَاحِدٍ يَتَخَفَضَانِ وَيَرْتَفِعَانِ  
رَأَيْتُ مِضْطَرِبَانِ مُضْطَرَابَ الْخَيْزُرَانِ . رَأَيْتُ رَجُلًا  
وَيْدًا أَقْعَى وَامْرَأَةً صَرَعَى وَرَجُلَيْنِ مَخْضُوبَتَيْنِ  
أَقْدَامُهُمَا يَذْهَبُ وَيَجِيءُ ...

وَأُفْقَالُ عَمْرُضَى اللَّهِ عَنْهُ : اللَّهُ أَكْبَرُ الْحَمْدُ لِلَّهِ  
فَقَدْ الَّذِي لَمْ يَفْضَحْ وَاحِدًا مِنْ أَصْحَابِ رَسُولِ  
اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ...  
اللَّهُ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ...

The naked feet, I saw, were high, the sighs were heavy and the act was disgraceful. I saw them under one blanket, rising up and down, shaking like a bamboo stick. I saw a man

squatting and a woman thrown on her back. I saw two feet dyed with hennā and a man going back and forth ...

Umar was delighted and said: "Good gracious! Thanks to God for not disgracing any members of the Companions of the Prophet ... <sup>76</sup>

According to Zayla'i (d.743) the pericope appeared first in the Tabaqāt of the Ibn Sa'd (d.230). However, the editor of Zayla'i's work points out that he did not manage to find the pericope in the Tabaqāt of Ibn Sa'd. <sup>77</sup> It does, however, appear in the Mu'jam of Ṭabarānī (d.360) and the Majma' al zawā'id of Haythamī. Shāfi'ī gives a hint that he knew the pericope but without giving details. He merely said: "...If the witnesses do not reach the required number -i.e. four, then they are qadhafa .... that is how Umar reached his decision ....." <sup>78</sup> Whether the episode was produced during Shāfi'ī's time or not, two things are obvious. a- The pericope bears strong anti-Umayyad propaganda common at that time. The motive is to show what sort of people Mu'āwiya depended on building up his authority. b- The choice of some names who were supposed to be witnesses is not without significance; Ziyād b. Abih, another prominent Umayyad governor after Mughīra, is himself surrounded by hundreds of anecdotes most of which were reported by Balādhuri (d.279) in his Ansāb al-Ashrāf. The pericope was soon taken up by some traditionists and was incorporated under the manāqib section; for it was interpreted as testifying to the good qualities of Mughīra. This might be the reason why the pericope went into oblivion and very few traditionists reported it in their works. I have already pointed out that apart from Shāfi'ī, the first traditionist to report it was Ṭabarānī. His view was endorsed by al-Ḥākim (d.405) in his al-Mustadrak. <sup>79</sup>

Not unrelated to the problem is the question of ‘adāla (proviso III) and the acceptance of the evidence of a person who had been punished for qadhf - known as al-mahdūd fī al-qadhf. As far as the question of ‘adāla is concerned the dispute as to what constitutes good character is based on circumstances and social standards of a particular time and place. Thus, poets, chess players, singers, professional mourners, drinkers, etc. are accepted by some as valid witnesses while others reject their evidence.<sup>80</sup>

The question of the mahdūd fī al-qadhf was discussed in great detail, particularly by Shāfi‘ī against the Irāqīs. He provides long and tiresome arguments to refute the Irāqīs' attitude in rejecting the evidence of the mahdūd fī al-qadhf even after repentance. Their proof is that Q.24:4 which says: "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) flog them with eighty lashes and reject their evidence ever after; for such men are wicked transgressors." Basing their argument on ".....reject their evidence ever after ...." the Irāqīs do not accept the evidence of a person who had been punished for qadhf.<sup>81</sup> Mālik accepts the evidence of the mahdūd after his repentance and claims that to be the practice of the people of Medina.<sup>82</sup> However, Shāfi‘ī endorses the doctrine of Mālik and attacks severely the doctrine of Irāqīs on the ground that they did not finish reading the subsequent verse Q.24:5 "Unless they repent thereafter and mend (their conduct); for God is Oft-Forgiving Most Merciful." Shāfi‘ī argues that the exception (al-istithnā) introduced by illā is connected with Q.24:4. His unnamed opponent argues that istithnā cannot be connected with mustathnā unless the former follows the letter immediately.<sup>83</sup> In the above case, the istithnā excludes only the description of being "transgressors" mentioned at the end of the Q.24:4, and not the command of rejecting the



evidence for ever. <sup>84</sup> Hence, the mahdūd fī al-qadhf cannot give evidence as long as he lives. But Shāfi'i dismisses this view and says: "...no one of the well learned people has ever suggested that the istithnā excludes only the immediate description. It is generally agreed that in such cases the istithnā excludes all previous descriptions ...." He goes on to present his argument in great length until he comes to produce a hadīth ascribed to 'Umar - presumably the Mughīra episode - in which 'Umar said to Abū Bakra: "Repent, your evidence will be accepted (in future)." Then Shāfi'i goes on to list several names of people who accepted the evidence of the repented mahdūd. <sup>85</sup>

Now the heading XII. SINGLE PRESENCE and XIII. LACK OF ELAPSE OF TIME came to be specifically associated with the hadīth of iqrār -self confession. There is no Prophetical hadīth or otherwise which came to be connected with any of the two provisos. Yet, there is wide disagreement among the fuqahā. The arguments for or against these topoi are similar to those of the Shahāda of the blind, non-muslims, and the minors with respect to their regaining sight, becoming Muslims and maturing respectively.

To summarize, most of the issues which occupied the minds of the early fuqahā, with respect to the procedures and stipulations of testimony had no Prophetical hadīths to support them. The early fuqahā depended on their personal opinions, or the opinion of their preceding masters, to reach conclusions. The choice of authorities was arbitrary, while individual opinion was based on personal conviction and

principles. In a few cases, where there was or were Prophetical ḥadīth/s, the Ikhtilāf was prior to the ḥadīth/s. In those matters where there were no Prophetical ḥadīths, some fuqahā "adopted" Quranic "pegs" commonly known through their association with haggadic material, dealing with different but not unrelated issues, to enshrine their ideologies. The attempt was successful to the point that, even when some Prophetical ḥadīths were produced to support those ideologies, qadhf and zinā accusation became one, and the material of each was adduced to prove the other. By the time of the Post Classical Period the choice of textual proofs was much wider, and zinā accusation proper and qadhf became inseparable issues.

## CHAPTER X

### IQRAR

Iqrār, literally, acknowledgement, but in zinā cases is explained as I'tirāf bi al-zinā (Confession to adultery), is another incontrovertible evidence by which the liability to the ḥadd punishment can arise. Once a mature guilty person, who is in full possession of his faculties, confesses to adultery of his own accord, the ḥadd punishment will be applied to him. Thus, in practice, iqrār is the most conclusive and indisputable means of creating an obligation on the part of the person who makes it. In theory, however, iqrār is weaker than the evidence of witnesses, the shahāda.<sup>1</sup> For apart from the existence of stringent stipulations and demands for the latter, as we have seen in the previous chapter, in many cases, the liability which arises from the iqrār could be discharged if the muqirr (confessor) retracted his acknowledgement.<sup>2</sup> The incontrovertibility of the iqrār is based on a Prophetical ḥadīth which declares:

O you people: It is high time you stopped breaking God's limits.

He who commits anything among these vices, let him seek God's cover, for we will inflict the Book of God on whoever uncovers his buttocks before us.

Ma.Hudūd.C.2.H.1.

But the validity of the iqrār, together with its liability, is the extent of the general agreement among the fuqahā. These two points provoke a

considerable scope of disagreement. The issues involved here are many and intricate. Thus, unless we confine ourselves to those primary issues of immediate relevance to our subject, we might wander from the point.

There are two topics which are directly involved with the ḥadīth materials analysed in Section I.

- a) ‘Adad al-aqārīr (The number of confessions)
- b) Rujū‘ al-muqirr an iqrārihi (Withdrawal from confession)

#### ‘Adad al-aqārīr

The kernel of the problem is how many times does the confessor have to pronounce his confession to adultery before the question of liability to the ḥadd punishment can arise? The Pr.F.P. scholars of Irāq maintained that the culprit must pronounce his confession four times. The question came to be known as the four-fold confession. This is the view of Ibn Abī Laylā, Abū Ḥanīfa and his two disciples, Abū Yūsuf and Shaybānī. The former based their argument on analogical conclusions derived from Q.24:4, which deals with qadhf, and possibly Q.4:15, which deals with fornication. Their argument is that since Q.24:4, and 4:15 demand four witnesses for qadhf, and fornication respectively, anyone who confesses against himself to adultery must also pronounce his confession four times. Abū Ḥanīfa takes the analogy even further to demand that each confession must be pronounced at four places and on different occasions (fī majālisa mukhtalifa) so that each confession will correspond precisely with one of the four witnesses demanded by the Qur‘ān.<sup>3</sup> Neither Ibn Abī Laylā nor Abū Ḥanīfa, however, adduced a conclusive Prophetical ḥadīth to back up his demand. For not unknown reasons, the Prophetical ḥadīth which could be thought to be in favour of

that doctrine during the time of these prominent Irāqī scholars did not prevail in Irāq, but in Medīna. This is the basic unit of what later came to be known as the Story of Mā'iz primarily transmitted on the authority of Ibn Shihāb. The function of the unit, however, was to establish the validity of confession in general. The identity of the culprit is not known, and the pericope has no isnād. Ibn Shihāb is simply alleged to have said:

"A man confessed to adultery, during the era of the Prophet, four times, and the Prophet had him stoned to death.

Thus, a man is accountable to his confession."

Ma.Ḥudūd.C.1.H.4

The units was soon adopted in Irāq and was furnished with some details, but still not sufficient to support the doctrine of the majālisa mukhtalifa.<sup>4</sup> Abū Yūsuf, however, did not go along with the extreme qiyās of Abū Ḥanīfa. Instead, he was content to demand only four-fold confession, hence supporting the doctrine of Ibn Abī Laylā. He adduces a version of the Story of Mā'iz to support his view.<sup>5</sup> However, the doctrine of Abū Ḥanīfa and Ibn Abī Laylā was bitterly rejected by Mālik in the Ḥijāz. For Mālik, a single confession was enough to create liability to the confessor.<sup>6</sup> He bases his argument on the account of the Story of the Hired-hand, the 'Asīf, in which the Prophet is claimed to have instructed Unays to go to the woman who was claimed to have fornicated with her employee, and in case she confessed to adultery, Unays should stone her to death. She did and he stoned her to death. Mālik's argument is derived from the fact that the Prophet did not instruct Unays to obtain four confessions from the woman.<sup>7</sup>

In contrast, Shaybānī, who hardly differs from the views of Abū Ḥanīfa, does not accept Mālik's view, despite the fact that he transmits the Muwatta' of Mālik directly from the author. He remains adherent to the analogy of Abū Ḥanīfa. At one point, his loyalty to his master left him face to face with Shāfi'ī, who supports Mālik's view.<sup>8.a</sup> Realizing that the Irāqi doctrine was based on two grounds, systematic reasoning and a Prophetical ḥadīth, Shāfi'ī launches an equal attack on both arguments.

With respect to the analogy of Abū Ḥanīfa, Shāfi'ī dismisses the argument for two reasons. First, for Abū Ḥanīfa's failure to distinguish between the iqrār and the shahāda, and secondly for his failure to observe his own qiyās in other similar cases. Shāfi'ī distinguishes the shahāda from the iqrār by arguing that a crime which has been established by the former is irrevocable, and in such a case the accused would have no room to appeal against the ḥadd punishment, while a crime which has been established through the iqrār can be repudiated by the confessor if he withdraws from his words.<sup>9</sup> As can be seen, Abū Ḥanīfa's crude analogy is no worse than the clumsy distinction of Shāfi'ī. As much as Abū Ḥanīfa fails to distinguish between the iqrār and the shahāda, so does Shāfi'ī by adopting two false premises. Iqrār creates liability and obligation to the person who makes it. Thus, it is the muqirr who will naturally have the right of repudiating his confession, provided he has firm grounds for so doing. Shahāda, on the other hand, is evidence produced by a third party against a culprit. Thus, the right of retreating from the evidence should also be given to those who provided the evidence and not the culprit, for the culprit in such a case has no right of appeal.<sup>10</sup> Further, both Shāfi'ī and his adversaries agree that in zinā cases, as well as in other cases, the retraction of the evidence would prevent the application of the ḥadd punishment to the accused, and

in zinā cases the withdrawing witness will be liable to the qadhf punishment.<sup>11</sup> Thus, Shāfi'i's distinction is equally false because it is based on two false premises. The distinction, therefore, does not stem from the right of repudiation from the guilty party, but from the type of liability created by the iqrār and the shahāda. Iqrār creates liability to the person who makes it, while the shahāda imposes liability on the third person. Thus, provided the muqirr is sane and knows the consequences of his confession, there will be no need to ask him to confess four times at several and different places. Conversely, no matter who the witness is, his evidence against a third party imposes liability on that person. There are several possible reasons why the witness may give evidence against someone else. Thus, depending on the nature of the evidence, secondary independent evidence is not only desirable, but also, in many cases, unavoidable. However, the most compelling argument is Shāfi'i's second attack against Abū Ḥanīfa's selectivity in employing the qiyās. The argument is based on a hypothetical case of theft assumed in accordance with Abū Ḥanīfa's doctrine of qiyās and at the same time derived from his juridical decision preserved by his disciples, Abū Yūsuf and Shaybānī.<sup>12</sup> Accordingly, if Mr. X goes to Abū Ḥanīfa and gives evidence that he has seen Mr. Y stealing such-and-such a thing, Abū Ḥanīfa will not consider this evidence as sufficient proof to implement the hadd punishment for theft until another witness appears to back up the primary witness. But if Mr. Y. himself goes to Abū Ḥanīfa and confesses once to theft, Abū Ḥanīfa will implement the hadd punishment for theft because of his confession. Shāfi'i welcomes this decision and supports it, but equally points out the lack of consistency in Abū Ḥanīfa's qiyās. In the previous case he equated the shahāda with the iqrār, but in the present case, he distinguishes the shahāda from the iqrār. Accordingly, Abū Ḥanīfa should have been systematic in his methods, and hence should have

asked Mr. Y to confess twice to correspond with the two witnesses he requires for the shahāda in theft. Conversely, Abū Ḥanīfa should have accepted a single confession to adultery, but remained adherent to the request for four witnesses for the shahāda.<sup>13</sup> The argument takes Shāfi'ī to his second step of providing a Prophetical ḥadīth for the validity of a single confession. This is the second unit of the Story of the Hired-hand. But he is equally aware of the Prophetical ḥadīth used by his adversary, this time presumably Shaybānī, who after listening to Shāfi'ī's arguments, retorts saying, "But Zuhri had transmitted a version in which the culprit is reported to have confessed four times."<sup>14</sup>

Ibn Ḥanbal, according to Kh̲awqā'ī, adopted the doctrine of Ibn Abī Laylā. However, unlike Ibn Abī Laylā, he had a number of Prophetical ḥadīths to support the attitude of four-fold confession. Among these are the later and revised versions of the Story of Mā'iz and the Ghāmidīyya.<sup>15</sup> Abū Dāwūd reports that:

"Ibn Ḥanbal was asked, 'Do you think that an adulterer must confess four times?' 'Yes', replied Ibn Ḥanbal. 'What is your naṣṣ, is it the Story of Mā'iz?' 'What else?' 'What about the question of pronouncing the iqrār at different occasions and different places?' 'No, I do not agree with that. No one has said that Mā'iz had confessed before the Prophet at different places and on different occasions but that old man, Bashīr b. Muhājir'".<sup>16</sup>

What Ibn Ḥanbal was not aware of was that there were several people who transmitted several and contradicting version that Mā'iz did confess before the Prophet on several days and at different places.<sup>17</sup> In fact,



by the time of the Classical Period, both the Story of Mā'iz and of the Ghāmidīyya came to be associated in every discussion for the support, or refutation of the four-fold confession. Indeed, the mode and number of confessions enshrined in these two stories and in their multiple self-contradicting versions, make it almost impossible to discern any logical conclusion of this particular point. For the proliferation of these stories was not only directed to support or refute contradicting opinions within one school - i.e., the supporters of Abū Ḥanīfa against Ibn Abī Laylā - but also against the early Irāqīs by the supporters of the rival schools - the Mālikites and Shāfi'ites. The traditionists too joined the dispute. Bukhārī, for instance, was in favour of the validity of a single confession,<sup>18</sup> while his student Muslim seems to have inclined toward the necessity of four-fold confession.<sup>19</sup> Those who favoured the single confession depended primarily on the Story of the Hired-hand. The early Irāqīs never acknowledged this ḥadīth, and those who knew it ignored it completely.<sup>20</sup> Similarly, later Ḥanafites either rejected it or reinterpreted its content by alleging that Unays must have been aware of the necessary legal confession.<sup>21</sup>

### Repudiation of the Iqrār

The question of whether or not withdrawal from confession after acknowledgement is valid was disputed by Ibn Abī Laylā and Abū Ḥanīfa.<sup>22</sup> The centre of their dispute seems to have erupted from the question of whether the ḥudūd are to be considered as compulsory or deterrent.<sup>23</sup> Ibn Abī Laylā thought the ḥadd punishment compulsory and hence once the culprit had confessed to a ḥadd punishment, his later repudiation was void. Abū Ḥanīfa thought otherwise. For him, the ḥadd is a deterrent designed to serve a particular purpose, such as to reduce the crime.<sup>24</sup> In other words, the ḥadd punishment for Abū Ḥanīfa is not an end in

itself. Accordingly, withdrawal from the confession is valid and once the confessor to a hadd punishment retracts his words whether before or during the hadd punishment, the punishment should not be carried forwards or completed.<sup>25</sup> To this effect, Abū Ḥanīfa produced an additional element to the Story of Mā'iz in which it is claimed that during the punishment, Mā'iz ran away, but people ran after him and finished him off. Later on, they informed the Prophet about his running away, whereupon the Prophet said, "You should have left him alone." This was taken by Abū Ḥanīfa as an indication that Mā'iz's action was understood by the Prophet to be a repudiation of his confession.<sup>26</sup>

Abū Ḥanīfa's view was welcomed by Mālik. Nevertheless, he knew no Prophetical ḥadīth to that effect, or to say the least, did not think the account of Abū Ḥanīfa concerning Mā'iz's escape was authentic. Instead, he resorts to reasoning, and states:

Whoever confesses to adultery and then retracts his confession saying "I did not actually commit adultery but I did such-and-such", giving any reason, his words should be accepted and the hadd punishment should be stopped. This is because the hadd, which belongs to God, cannot be established except by two means: a) Clear evidence against the culprit, and b) Self-confession to which the culprit must adhere right to the end of the hadd punishment. If he does so, the punishment should be carried out to the end, otherwise it should be stopped.<sup>27</sup>

Shāfi'ī was very much attracted to this view. But he also realized the validity of Ibn Abī Layla's point of view. He therefore drew a line between those cases where the repudiation can be accepted and those case

where it should be rejected. For all those cases which are known to be crimes against the Religion, such as zinā, retraction of confession is valid. But for those crimes against civil rights, such as cases of retaliation - qisās - repudiation is void. When there is a case which involves both rights, such as theft, then repudiation will stop only the ḥadd punishment from being applied, but the stolen property must be returned to its owner, and if the property were destroyed, then the owner must be compensated for its loss.<sup>28</sup> Shāfi'i's distinction became the opinion of the jamhūr and thus retraction of confession to adultery was almost generally accepted. Consequently, Abū Ḥanīfa's account concerning Mā'iz's escape was widely endorsed. Tirmidhī, for instance, included it in his version of the Story of Mā'iz.<sup>29</sup>

To sum up, the juridical disputes of the Pr.F.P. and F.P. scholars led not only to reinterpretations of a particular version of a given pericope, but also to the proliferation of intricate and mutually exclusive details, and sometimes to the adaption of a particular story as introduction to or exegesis of another story.

## CHAPTER XI

### HABAL

Habal, "illegal pregnancy" -- sometimes expressed as haml -- is the third proof of conviction for adultery. However, unlike the shahāda and the iqrār, there is disagreement as to the validity of habal as sufficient evidence for conviction.

A pregnant woman who is neither married nor a concubine, or is a concubine whose master denies having had sexual intercourse with her, is not punishable by the hadd unless she confesses to adultery. This is the doctrine of the Pre-Formative early Irāqīs which was also supported by Shāfi'ī.<sup>1</sup> Once such a woman confesses to adultery (or was convicted on the grounds of the shahāda) her habal plays no significant role in her conviction other than being a temporary barrier to the immediate hadd punishment. Conversely, if she denies having committed adultery or claims to have been raped she cannot be punished nor would she be further inteorrogated.<sup>2</sup> The Irāqīs base their argument on the ground that "illegal" pregnancy alone cannot be considered conclusive evidence for prosecution. For it is possible that the woman had either acted under duress ( ustukrihat ) or conceived without having had direct contact with a male, e.g. having contact with male sperm from public baths (hammām).<sup>3</sup> Such possibilities make habal ineffective proof unless confirmed by direct confession. A number of general maxims based on the principle of "Proof must be beyond the shadow of doubt" were produced on the authority of prominent scholars of the Ideal Period.

Among these are:

إذا كان في الحدود لعل وعسى فهو معطل

"Perhaps and "maybe" concerning the hudud nullify its application

4

إذا تطرق إلى الدليل الإحتمال سقط به الإستدلال

Contingency touching upon a proof makes the evidence void. 5

الشك يُفسر لصالح المتهم

The accused enjoys the benefit of the doubt. 6

and:

إذا اشته عليك الحد فادرأ ما استطعت

Restrict the hadd punishments when there is uncertainly. 7

Mālik, however, considers hamal as prima facie evidence unless the accused produces more conclusive counter evidence to deny the charges. "This", Mālik claims, "is the practice in Medina. No plea will be accepted from a pregnant woman such as having been raped or having been married before, without her producing indisputable evidence, like bleeding or witnesses to back up her claim. Failing to do so she is punishable by the hadd." 8

Ibn al-Qāsim, a student of Mālik (d. 191), introduces a distinction between a newly arrived immigrant and a local inhabitant ( tāriya ghariba wa ghayr tāriya ). The former will not be punished but the latter, unless she produces indisputable evidence against her condition, will be punished by the hadd. 9 The distinction, it seems to

me, is based upon the ground that there is uncertainty with respect to the background of the former but the latter, being a local woman, will be known and hence any claim of having been raped or married before can be substantiated and/or denied locally. A similar distinction is described to 'Uthmān al-Battī ( a Baṣran scholar, d. 143).<sup>10</sup> Nevertheless, unlike the early Irāqīs who argued from both practical and theoretical points of view, Mālik bases his argument on two grounds: the local practice and the ḥadīth of 'Umar.<sup>11</sup> The latter is the report that 'Umar had said:

The Stoning Penalty is a just claim in the Book of God for those who fornicated -- men and women, who have attained the status of iḥṣān -- when there is proof, or pregnancy, or confession.

Ma. Ḥudūd.C.1.H.8.

The pericope, which I have earlier called Mālik's stratum, for he was the first author to transmit it, was later incorporated into the Story of 'Umar which, incidentally, was also transmitted by Mālik as an independant pericope.<sup>12</sup> Neither, however, appears to have been known to, or at least was not adduced by the early Irāqīs up to the time of Abū Yūsuf (d. 182).<sup>13</sup> We may recall here that the language and style of the pericope appear to be more compatible with second century jurists than with 'Umar, and that the name of Zuhri, the immediate transmitter of Mālik (d. 124) is probably a convenient peg for the antiquity and hence authenticity (sic) of the pericope.<sup>14</sup> It would seem to me that the Medinian practice was most probably provoked by early Irāqīs' attitude

and in turn 'Umar's pericope proliferated.<sup>15</sup> Prior to its proliferation, the situation between the two regions would seem to be that while the Irāqis viewed the dispute from the principle that "Silence does not necessarily entail submission to nor denial of the charges",<sup>16</sup> the Medinians based their conviction on the grounds that "He who denies not the charges has submitted to being guilty".<sup>17</sup> Subsequently, the Irāqis waived the hadd punishment for a pregnant woman because of the uncertainty "Probability is not a ground of legal proof".<sup>18</sup> The prime force behind such an attitude was undoubtedly the common maxim in Irāq which says: "Restrict hadd punishments as much as possible".<sup>19</sup> Mālik had never accepted the maxim as authoratative.<sup>20</sup> In order to validate their local practice, the Medinian produced the pericope of 'Umar.

Related to the habal controversy is the question of a married woman who gave birth to a fully normal child in less than six months from the date of her marriage. The Irāqis would not punish the woman unless she confessed to adultery. Mālik, however, would apply the hadd punishment unless the woman repudiate the charges with more conclusive evidence. To this effect, Mālik reports that it came to his attention that:

A woman was brought to 'Uthmān b. 'Affān because she had given birth to a child in six months. 'Uthmān gave his orders to stone her to death. But 'Alī b. Abī Ṭālib said to him: 'You cannot stone her to death. God says in His Book: "The carrying of the child to its weaning is a period of thirty months" (Q.47:15) and "The mothers shall give suck to their children for two whole years, if the father desires to

complete the term" (Q.2:233). Thus a woman who gives birth in six months period cannot be stoned to death!' 'Uthmān sent for the woman but the messenger found her already dead from the Stoning Penalty.

Ma.Hudūd.C.1.H.11.

The argument of this ḥadīth is that the suckling period has been set by Q.2:233 to be twenty four months, and that Q.47:15 combines both the period of conception and the suckling period into thirty months. Thus not only is it possible for a woman to give birth to a fully normal child in six months, but also the six months period is the minimum legal duration of pregnancy set by the Qur'ān.

The same ḥadīth was reported by the adherents of Abū Ḥanīfa's position, going back to Sufyān al-Thawrī (d. 161). However, 'Umar b. Khaṭṭāb takes the place of 'Uthmān b. 'Affān. Other versions, whose isnād is distinctively Baṣran, make Ibn 'Abbās the challenger to 'Uthmān, while Meccan versions make either Ibn 'Abbās or 'Alī fill that role. Most of the Irāqī versions add "...who gave birth in less than six months" ( waḍa'at li dūni sittat ashhur). Ibn 'Abdulbarr, a Mālikite scholar (d. 463), dismisses all versions but that of Mālik on the ground that the incident took place in Medina and hence the Medinian version is the most correct one. <sup>21</sup>

Not unrelated to the ḥabal controversy is the question of the appropriate time to apply the ḥadd punishment to a pregnant woman.



Abū Ḥanīfa and his disciples hold that once the pregnant culprit confesses to adultery, the hadd punishment should be applied almost immediately after the birth of the child. Otherwise the hadd would become invalid because of the elapse of time ( litaqāḍum al-ahd).<sup>22</sup> Mālik distinguishes between the availability of a wet-nurse or relative/s to look after the child and the lack of either. In the former case the hadd punishment should not be delayed. But in the latter case, the culprit should be allowed to nurse the child until the end of the suckling period.<sup>23</sup>

Shāfi'ī and Ibn Ḥanbal do not make any proviso. They give the mother not only the overall preference to suckle and wean the child but also will not punish her until she comes back and confesses to adultery after weaning her child.<sup>24</sup> Ibn Ḥanbal, however, sets the minimum period of thirty months for conception, suckling and weaning. This is derived from Q.47.15 and Story of the Ghāmidīyya.<sup>25</sup>

Thus, by the time of the Classical Period, the Story of the Ghāmidīyya came to be specifically associated with the doctrine of the appropriate time for the application of the hadd punishment to a pregnant woman in addition to its function in the dispute on the validity or necessity of four-fold confession to adultery. Similarly, the Story of the Juhaniyya came to be primarily employed for the doctrine of Abū Ḥanīfa with respect to the appropriate time for the hadd punishment of a pregnant woman in addition to its involvement with the validity of a single confession to adultery. Neither ḥadīth, however, appears to have been known to Abū Ḥanīfa. Nor does Shāfi'ī appear to have known either ḥadīth, not even the story of the pregnant woman reported in the

Muwatta'. It is worth recalling here that the Story of the Juhaniyya seems to be earlier than the Story of the Ghāmidīyya and that both stories were produced in reaction to the Story of the Legendary Mā'iz.

## CHAPTER XII

### JALD

The term "hadd", pl. "hudūd", is among those numerous words which have been exhaustively used in a number of profane and religious sciences to denote various concepts and forms. <sup>1</sup> In fiqh, however, the term has been technically employed for the punishments of certain acts which have been forbidden or sanctioned by the "the law". <sup>2</sup> Here, the term means "prescribed penalty" and there are six crimes which fall under the hudūd. <sup>3</sup>

1. Zinā - unlawful sexual intercourse.
2. Qadhf - false accusation of unlawful sexual intercourse. <sup>4</sup>
3. Khamr - consuming alcoholic liquor. <sup>5</sup>
4. Sariqa - theft. <sup>6</sup>
5. Qaṭʿ al-tariq - highway robbery. <sup>7</sup>
6. Ridda - apostacy. <sup>8</sup>

Our concern here is the hadd for zinā.

## THE PUNISHMENT FOR ZINĀ

Depending on the point of view of a particular school or on the theoretical and practical distinctions of certain individual jurists, the punishment for zinā usually takes one of the four following forms:

- a - One hundred lashes, known as jald;
- b - Death penalty by stoning, known as rajm;
- c - One hundred lashes, plus a year's banishment, known as Jald wa al-Taghrīb, or sometimes as Jald wa al-Nafy;
- d - One hundred lashes, plus death penalty by stoning, known as Jald wa al-Rajm.<sup>9</sup>

The application of any of these punishments, as we shall see, rests not on free choice but on schismatic conviction or on methodological grounds. And, perhaps, it would be fair to say, these two areas were the starting points for the Ikhtilāf.

### JALD = FLOGGING

Jald is the only punishment unanimously agreed upon as a penalty for zinā. It has been laid down by the Qur'an:

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

"The adulteress and the adulterer, flog each one of them one hundred lashes" (Q.24.2).

However, there is a dispute as to whether jald is the one and only penalty to apply in all cases of zinā, or not. The Khawārij, the oldest religious sect in Islām, traditionally labelled as heretic,<sup>10</sup> maintained that jald was the only punishment applicable in all cases of zinā. Their attitude was based on the conviction that nothing was mentioned by the Qur'ān but jald.<sup>11</sup> Later on, their opinion was echoed by some members of the Mu'tazila - a theological group developed into a distinctive school, which initiated the discussions of Islamic dogma in philosophical and hence rational concepts. For the sake of our discussion in this chapter, I shall call these two groups The Quranic Party, though strictly speaking, the Mu'tazila were not so.<sup>12</sup> In opposition to the Quranic Party's attitude was the opinion of the so-called al-jumhūr, i.e., the majority of the ulamā'. They insisted that jald is the penalty of zinā for virgins, known as bikr (pl. abkār) but technically called ghayr muḥṣan. The non-virgin thayyib -but technically known as muḥṣan - should be stoned to death according to the teachings and practice of the Prophet, the Sunna. The preferential treatment was heavily invested in a number of prophetic and non-prophetic traditions. We will have a chance to see how, why, and even when this discretion was felt to be necessary. But first, I would like to examine the traditional claim that the Khawārij and some members of the Mu'tazila rejected all those Traditions in favour of the SP.

The first thing to note here is that we have no first hand information concerning the anti-SP position, particularly (fb) the Khawārij. Our information comes entirely from later Sunni sources.<sup>13</sup> There, the Khawārij and some Mu'tazila, are claimed to have rejected the SP on the ground that not only is it not even mentioned in the Qur'ān, but also it is in total contrast to the only ruling that is mentioned there - jald. Furthermore, the Traditions, which are in favour of the

SP, are isolated reports: Akhbār āḥād (sing Khābar al-wāḥid), that is, reports which have been related by, or ascribed to, individual transmitters. <sup>14</sup> "These", our sources report on their behalf, "cannot stand against Quranic injunctions, which have been recorded and transmitted by tawātur. <sup>15</sup> Reports of such nature constitute nothing but doubt and uncertainty - ẓann, as opposed to yaqīn: certitude, conviction, certainty. <sup>16</sup> The kernel of the problem here is that jald was ordained by the Qurʾān, which has been preserved and acknowledged by tawātur, while rajm, which is totally different from jald, came to be known through individual reporters. Their accounts are Akhbār āḥād; hence Quranic ḥadd must be the only lawful punishment for zinā.

As can be seen, the discussion is not only based on a technicality concerning the Traditions, but also on deductive logic, and it may be worth recalling here that neither was known in discussion before the middle of the second century AH. In fact, the technical distinctions and classifications of the ḥadīths did not come into existence until after the beginning of the third century AH.

Now, the combination of the Khawārij and Muʿtazila on the grounds that they argue from a common point of view, is a deliberate attempt to distort the "truth" or, to say the least, is a reaction to the prevailing situation, during which the pro-Tradition forces were at pains to secure recognition for the Traditions in the systematization of the law. <sup>17</sup> For, unlike the early and later Muʿtazila who witnessed this tug-of-war, the Khawārij existed well before the circulation of the ḥadīths. Their opposition to the SP could hardly have been based on a technicality, let alone on logic. An entirely different ground for their argument,

therefore, must be established, and any investigation to that end must be conducted along appropriate lines. Only then, can an objective assessment of their point of view be made.

The Khawārij, who came into existence as a result of the battle of Ṣiffīn (c.37-8 AH), were people who opposed 'Alī's arbitration to end the war between himself and Mu'āwiya.<sup>18</sup> Their theoretical ground was expressed by the slogan, Lā Ḥukm illā li-llāh (No decision but God's, or the only valid decision is God's alone). God's decisions could be known only from the Qur'ān, the true word of God. Although the slogan would appear (and rightly so) to have a deep-seated political motivation - hunger for power in the name of the community<sup>19</sup> - it was not long, by virtue of its implication, before it came to embrace a wide range of religious issues.<sup>20</sup> We do not know at what time the issue of the SP as the hadd for zina was specifically invoked. Nor do we know the details of the arguments put forward by those who were involved in the discussion. Our sources mention the Azāriqa, a notorious subset of the Khawārij (an eponym of their leader Nāfi' b. al-Azraq)<sup>21</sup> as being the champions of the anti-SP. The Azāriqa, labelled as terrorists for their almost indiscriminate killings, rejected the SP as not being a divine law - Quranic.<sup>22</sup> Watt, in his discussion of the Khārijites, suggested, perhaps unintentionally, that it was the Najdites who put an end to the penalty because it was impossible to implement it in every instance of adultery. This, according to Watt, was a reaction to the extreme policies of the Azāriqa.<sup>23</sup> Neither explanation is acceptable. The Azāriqa did not appear on the scene until at least two decades or more after the early days of the Khārijism.<sup>24</sup> 'Alī himself was reported to have been opposed for having imposed the SP.<sup>25</sup> It is inconceivable that all members or supporters of Khārijism should remain silent on the issue of the SP for over twenty years, despite their general principle of

Lā hukm illā li-llāh, unless the supporters of this view are ready to accept that there was no case or discussion of the SP during that period. It seems to me that there is at least one reason for claiming the Azāriqa were the anti-SP force. They were the first, and perhaps the only Khārijite sect to have developed some sort of cohesive theological structure of their own. Thus they were much more easily identified or associated with the issue than anyone else from within Khārijism.<sup>26</sup> In addition, the terrorism and banditry usually associated with them made it easier for the pro-SP forces to campaign for the SP. Far less convincing is the claim that the Najdites rejected the death penalty for zinā partly as a reaction to the indiscriminate killings of the Azāriqa, and partly because of the vast area which was under their jurisdiction.<sup>27</sup>

The Najdites (an eponym of Najda ibn ʿĀmir al-Ḥanafī), who were active between 65 and 72 AH,<sup>28</sup> were members of the Khārijite sect whose views were relatively moderate in comparison with those of the Azāriqa. Their moderate attitude centred on the status of the grave sinner and not on the punishment for his crime. A person convicted of a grave sin would still have been punished according to God's laws, but the primary question was whether or not he was considered mushrik. The corollary was that if he were to be considered as an unbeliever, then he might lawfully be killed. The Najdites thought otherwise.<sup>29</sup> Now, while it is true that the knowledge of who, among the early anti-SP forces, presented their arguments, and when and how they did so would be of enormous significance to use, one should not feel hindered by the absence of such first-hand material, from drawing a reasonable conclusion, provided one adopts a proper perspective on the entire issue.

The Khawārij, irrespective of their sub-divisions, were unmistakably united under the banner of Lā hukm illā li-llāh. The



slogan was the central point of all their arguments and claims. The slightest violation of God's laws and decisions would provoke strong opposition on their part. Most of them were extremely pious, self-sacrificing and sometimes even ruthless for the sake of God.<sup>30</sup> It was this deep-seated conviction that led some members of the Khawārij to reject the violation of God's laws by local authorities. 'Alī or his associates must have been among those who encountered this kind of opposition and the SP as punishment for zinā must at one point have figured highly, either on the level of decision-taking or on that of discussion. However, the discussion itself could never have arisen if the SP had, in fact, been firmly implanted as the established practice generally accepted and recognized by everyone. In other words, the Khārijite opposition could not have been based on technicality or logic, as our sources tend to demonstrate, but rather it must have been provoked by reaction to an application of, or argument in support of, the SP and justified by their conviction that Lā hukm illā li-llāh.

It was the Mu'tazila who, undoubtedly familiar with the Khārijite position, adopted a binary opposition to the ever-increasing tide of Traditions in favour of the SP. During this period, that is around the middle of the second century of the Hijra, the Khārijite situation was beginning to be idealized in the Sunnī literature. The idealization itself was in response to the prevailing concerns of the time, and 'Alī was a perfect model, for he was the first one to deal with the Khawārij.

The basic units of this story run as follows:

A woman, convicted for adultery, was brought to 'Alī. He flogged her and then had her stoned to death. He then said,

"I have flogged her in accordance with the Book of God and stoned her in accordance with the Sunna of the Prophet." <sup>31</sup>

جلدتها بكتاب الله ورجتها بسنة رسول الله (ص)

Other interesting versions run as follows:

A woman confessed before 'Alī to having committed adultery. He flogged her on Thursday and then on Friday he stoned her to death. He then stood up and said, "The Stoning Penalty is a Sunna of the Prophet. Indeed, the Stoning Verse has been revealed but those who used to recite it, together with other Quranic verses, were killed at Yamāma." <sup>32</sup>

And:

A woman called Shirāḥa of the Ḥamdān tribe was brought to 'Alī because she had committed adultery. He flogged her with one hundred lashes and then had her stoned to death. Someone protested, "But you have inflicted two penalties!" "Yes", 'Alī replied, "I have flogged her in accordance with the Book of God and stoned her to death in accordance with the Sunna of the Prophet". <sup>33</sup>

More interesting readings put the protest/s in the followings forms:

جلدتها ثم رجتها؟

..."You have flogged her and then stoned her to death!" <sup>34</sup>

ما بال الرجم إنما في كتاب الله المجلد!

..."What is this stoning? The Penalty in the Book of God is flogging!" <sup>35</sup>

In both cases, Ali is reported to have given the same answer:

I have flogged her in accordance with the Book of God and stoned her to death in accordance with the Sunna of the Prophet. <sup>36</sup>

The Book of God here is undoubtedly a reference to Q:24.2. The Sunna of the Prophet refers definitely to claims that the Prophet himself had stoned to death those who were guilty of adultery. The absence of any elaboration from Ali's opponents might give the impression that both sources adduced by him were known to the protesters. Consequently, it might be thought that they were opposed, as seen in other versions, to the simultaneous infliction of the two penalties on the same culprit, rather than to the legality of each punishment in isolation. That this, however, is not the case is clearly demonstrated not only by the explicit reference to the SP, but also by the general acceptance by jurists and traditionists alike that the culprit in question was one and the same person in all versions. Consequently, the absence of further arguments from the supposed protesters would appear to me as yet another proof that the story was deliberately put forward by the generation of those who were engaged with the Mu'tazila.

The Mu'tazila rejected the Traditions altogether, and particularly those in favour of the SP, on two grounds. Most of these traditions, and certainly those bearing historicolegal connotations, tend to contradict each other, and in many instances, are in total contrast with the Quranic rulings. Furthermore, they employed logic and common sense. On the one hand, the only possible authentic account is a report which has been related by many, from many, from many, etc. On the other hand, any tradition which has been transmitted by an individual is susceptible to lies and fabricating. <sup>37</sup> The former was known as Khabar al-tawātur, or

simply Mutawātir. The latter as Khabar al-wāhid, or Khabar al-khāṣṣa.<sup>38</sup> Such was the situation between the Mu'tazila and the traditionists of the third century AH. It is worth recalling that this was the Classical Period during which the circulation of Prophetical Traditions was ever increasing. Thus, with reference to the SP, the Mu'tazila, or those who argued in their terms, were to be reminded that, before them, the Khawārij, or those who had supported their point of view, had similarly protested to 'Alī about the imposition of the SP. He had silenced them by calling to their attention the fact that he had done so in accordance with the Book of God and in accordance with the Sunna of the Prophet. The Sunna of the Prophet were the very Traditions which the Mu'tazila were then rejecting.<sup>39</sup> To substantiate their arguments, the anti-Mu'tazila forces had to rely on earlier distinctions laid down by the pre-formative period scholars, namely, jald for the ghayr muḥṣan and rajm for muḥṣan. This was the opinion of the jamhūr.

This distinction was originally proclaimed in Irāq and Hijāz in the form of a fatwā.<sup>40</sup> Among those names mentioned, are Nakha'ī (Kūfian authority, d.95-96 - see Abū Yūsuf: K. al-Athār, no.630, p.139), Tāwūs (Meccan authority, d.106 - see Ṣan'ānī, vol.7, no.13307, p.310), and 'Aṭā' (Meccan authority, d.114-115 - ibid., no.13306, p.309). Abū Ḥanīfa, too, is reported to have adopted similar lines (see Abū Yūsuf: Ikhtilāf, p.218). It was Mālik who provided a Prophetical ḥadīth to the same effect. This was the story of the Hired-hand in which only the woman was stoned to death, while the boy was flogged one hundred lashes and banished for a year.<sup>41</sup> Shāfi'ī was in an even better position to carry the argument further. He did so in two not unrelated ways: by systematic reasoning with the aid of the technical devices of harmonization and by acquiring a new Prophetical ḥadīth. His arguments run as follows:

God has said: "The adulteress and the adulterer, flog each one a hundred lashes". In another place, with reference to slaves, God said: "...if they have attained the status of iḥsān and then commit acts of great normal turpitude, they should suffer half the punishment of the 'free' woman. (Q:4.24).

Thus the Qur'ān has shown us that the flogging punishment is intended for free people and not for slaves. Furthermore, when we learn that the Prophet had stoned the non-virgin (thayyib) who was guilty of adultery and that he had never flogged him, we conclude from this practical example from the Prophet that Flogging is a punishment for virgins ( Risāla, nos.225-27). Were it not for the Sunna...we would have been compelled to flog every person guilty of adultery (ibid., no.235).

In another place in the Risāla, Shāfi'ī illustrates his arguments first with the story of 'Ubāda, then with another Prophetical ḥadīth which prescribes only the Flogging Punishment for slaves. Finally, he addresses himself to the problems of the iḥsān ( Risāla, nos. 375-92). The argument is repeated, but with a different emphasis, at nos. 616, 649, 782-95, 1125 and 1126. By the time of the Classical Period, the term muḥṣan, or its derivatives, was employed in almost every topical ḥadīth to emphasize that marital status is the criterion for deciding which of the two contradictory punishments should be inflicted upon the guilty party: the SP was confined to the muḥṣan culprit, while Flogging

was reserved for the non-muḥṣan culprit. The anti-SP forces were fighting a losing battle, for even later Muʿtazila, such as Abū al-Ḥasan al-Baṣrī (d.436) and Zamakhsharī (d.538), had to concede that jald is the punishment for the ghayr-muḥṣan, and rajm is for the muḥṣan.<sup>42</sup> And hence we arrive at our second topic - rajm.

## CHAPTER XIII

### RAJM

Whenever the term rajm appears within the context of adultery, its meaning is technically fixed to: "Death by stoning." This is the traditional interpretation for rajm. Linguistically, the term could be taken to refer to anything which has to do with condemnation. Hence, the death penalty is just one of many probabilities. Others are: to curse/damn/revile/abuse/castigate/execrate etc. etc. The Qur'ān itself employs the term or its derivatives fourteen times in different contexts. With reference to the satan: al-shayṭān al rajīm; Q.3:36; 15:17, 34; 16:98; 38:77; and 81:25. With reference to Shu'ayb and his people who said to him: "We hardly understand what you are talking about, Shu'ayb! Certainly, we find you very weak among us. Had it not been for your friends, we would have certainly condemned you ....." (wa lawlā rahaṭuk laraJamnāk.....(Q.11:91) Q.19:46 mentions Āzar, Abraham's father, <sup>1</sup> who warned his son saying "O Abraham! Are you dissociating yourself from my gods? If you do not stop it, I will condemn/stone/castigate you ..." <sup>2</sup>

A similar attitude is revealed in Q.36:18; 18:20; 26:116; and 44:20. Other employments are rajman i.e., conjecture/guesswork/prophecy (Q.18:22) and rujum i.e., shooting stars/meteorites etc., (Q.67:5). It is worth noting here that none of these contexts demonstrates that the punishment indicated therein is the death penalty by stoning. Nor does the Qur'ān mention the SP as the punishment for zinā. It is the Sunna which employed the term as the punishment for adultery, <sup>3</sup> and the fuqahā, or as they are called within the polemic context the jamhūr, assented to the view that rajm is the death penalty by stoning for those culprits who

attained the status of iḥṣān. Strictly speaking, that is as far as their agreement goes. There is a considerable dispute over the qualifying circumstances for attaining iḥṣān on the one hand, and, perhaps as a result, on the source of that penalty on the other.

### IḤṢĀN

Discussion of this topic is extremely intricate and involves a number of issues both related and unrelated. Its complexity has been shown by Burton in his article: The Meaning of 'Iḥṣān', in which he raises an interesting juridical point: namely, if iḥṣān was the criterion for the application of the SP during the era of the Prophet and his Companions, as it has been claimed by the jurists, when then have the jurists themselves failed to agree on its meaning? <sup>4</sup> His general conclusion is that the term was, among other things, merely a tool in the hands of unorganized opposition engaged in highly academic discussions in reply to the objection of the anti-stoning penalty forces; and hence, the whole issue is more likely to be demonstrating an ideal, than an actual situation. <sup>5</sup> We will see later how this was achieved. But first, let us look at the basic meaning of iḥṣān.

Arabic lexicographers discuss the term under the root h-s-n, from which the stative verb ḥaṣuna, is formulated to mean: be inaccessible, be well fortified, be protected ...etc. <sup>6</sup> Similarly, the II form will bear the meaning of: make inaccessible, strengthen, fortify, protect,



entrench, immunize, etc. Thus, ḥiṣn, for instance (pl. ḥuṣūn) is used to mean: fortress, fort, castle, citadel, stronghold, fortification etc.

Qurʾan 59:2 reads:

هو الذي أخرج الذين كفروا من أهل الكتاب من ديارهم لأول  
الحشر ما ظننتم أن يخرجوا وظنوا أنهم مانعتهم حصونهم  
من الله ...

He (Allāh) is the one who drove the infidels, among the people of the Book, out of their homes (diyār) at the beginning of gathering. Little did you think that they would get out. And they thought that their fortresses (ḥuṣūnuhum) would defend them from God, but God .....<sup>7</sup>

The same Sūra, verse 14, describes how the joint forces would fight the Muslims:

لا يقاتلونكم جميعا إلا في قرى محصنة ...

They will never fight you together, except in fortified townships (fī quran muḥassana ....) or from behind walls. Strong is their fighting spirit amongst themselves. You would think they were united, but their hearts are divided  
.....:

Similarly, Qurʾān 21:80 employs the term to denote protection:

وعلمناه صنعة لبوس لكم لتحصنكم من بأسكم فهل أنتم شاكرون

It was We Who taught him (David) the making of coats of mail for your benefit, to protect you (lituḥṣinakum) from each other's violence; will you then be grateful?

The verbal noun (maṣdar) is ḥaṣāna: strength, ruggedness, forbiddingness, impregnability, shelteredness, invulnerability, etc.<sup>8</sup> Ḥassan b. Thābit, for instance, is reported to have praised ʿĀ'isha, the Prophet's wife, saying:

حصان رزان ماترن بريبة وتصبر غرث من لحوم الغوافل  
عقيلة حج من لؤى بن غالب كرام المساعي مجدهم غير زل ثل

Invulnerable, self-possessed, beyond suspicion. Never thinking of reviling innocent women; a noble woman of the clan of Lu'ayy b. Ghālib, seekers of honour whose glory never cease to exist.<sup>9</sup>

In family law, but with penal law in mind, the common noun is iḥṣān, from which we get the adjective muḥṣan for male and muḥṣana for female. Here, the jurists, or as they are called the jamhūr, interpret iḥṣān as: consummated marriage/freedom/Islām/chastity or the combination of two or more of these meanings. Thus, a muḥṣan or muḥṣana could be described as: non-virgin/free/muslim/chaste, as much married/virgin/protected/dhimmi/pure, etc. Depending on individual, or collective, interests of the jurists, two distinctive conscious adaptations of the term were assumed. Muḥṣan/muḥṣana (passive) came to

mean: a person upon whom the status of iḥṣān has been conferred, while muḥṣin/muḥṣina (active) was fixed to an agent of iḥṣān, who may confer the status of iḥṣān upon himself/herself, or upon a third person or both. We will see the main reasons for all this later. But first I would like to provide a general sketch of the Ikhtilāf.

According to Shaybānī (d.189). Abū Ḥanīfa (d.150) maintained that a muḥṣan is married or divorced Muslim, whose marriage to a free born Muslim woman has been consummated, i.e. a non-virgin Muslim.<sup>10</sup> Shaybānī, who alleges that this is the general view of his colleagues, identifies himself with this view.<sup>11</sup> He bases his view on three stories: two versions of the story of 'Umar and ironically, the story of the Jewish couple.<sup>12</sup>

Ibn Abī Laylā (d.148) - a colleague of Abū Ḥanīfa - was of the view that a muḥṣan is a spouse whose marriage has been consummated. This was to accommodate the story of the Jewish couple about which he had heard that "the Prophet had stoned a Jew and a Jewess."<sup>13</sup> At this point we may pause to examine the views of these two prominent scholars of Kūfa: Abū Ḥanīfa and Ibn Abī Laylā.

I do not agree with Burton that Ibn Abī Laylā was unaware of the actual reasoning of Abū Ḥanīfa.<sup>14</sup> The mere dates of these two scholars, both in Kūfa, would suggest that he must have been fully aware of why Abū Ḥanīfa never assented to the view that dhimmīs convicted of adultery should be stoned to death. Similarly, the employment of the story of the Jewish couple by Ibn Abī Laylā for this issue would clearly show that Abū Ḥanīfa was equally aware of the story but never thought of it either as being pertinent to the issue in question, or as authentic. However, since Abū Ḥanīfa has neither employed nor transmitted the story of the

Jewish couple, one may perhaps assume with some confidence that he had never considered it authentic and, hence, it could have not been involved with the issue in question. In other words, Abū Ḥanīfa was commenting on the fiqh situation of his days. My hypothesis becomes more clear when we realise that unlike his predecessor Ibn Abī Laylā, who was a judge in Kūfa and hence was concerned with judicial practice, Abū Ḥanīfa was first and foremost a theorist. His exclusion of the dhimmīs from the stoning penalty arises from the general attitude of the early Irāqīs that dhimmīs' jurisdiction should be left in the hands of their respective religious leaders.<sup>15</sup> Ibn Abī Laylā, though he accepted this view generally, nevertheless, rejected it with specific reference to adultery, partly because "The Prophet had stoned a Jew and a Jewess", and, perhaps, partly because this is the true punishment in the Torah as it was fulfilled by the Prophet.<sup>16</sup> Abū Ḥanīfa had resorted to an earlier authority to substantiate his argument. He claims: "I was told by Ḥammād that Ibrāhīm (al-Nakha'ī, d.95 or 96) had said: "A man cannot become muḥṣan if he marries a Jewess or a Christian woman or his slave."<sup>17</sup>

Now, as we have noticed, Shaybānī supported Abū Ḥanīfa's view despite the fact that he knew and transmitted a more elaborate version of the story of the Jewish couple.<sup>18</sup> Abū Yūsuf, on the other hand, (d.182), took a different view. In his work Kitāb al-Kharāj, which could be described as the earliest work to discuss the Ikhtilāf of the term iḥṣān, he deals with the issue under the punishment of zinā. He states: "Muḥṣan and muḥṣana should be stoned to death."<sup>19</sup> He then goes on to state that the meaning of iḥṣan is admittedly a controversial matter among his own colleagues.<sup>20</sup> He lists five opinions current among his companions:

1 - Iḥṣān is restricted to, and attainable by, only free Muslim spouses in virtue of their consummated marriage.

2 - Iḥṣān is restricted to, and attainable by, any spouse of the same religion - provided that both partners are free. In the case of non-Muslims, their religious affiliation must be that of the ahl al-Kitāb or Ahl al-dhimma.<sup>21</sup>

3 - Iḥṣān is restricted to, and attainable by, all free spouses regardless of their religious affiliation.

4 - Iḥṣān is open to free spouses of different religions. But, in the case of mixed marriage, iḥṣān is restricted to a Muslim husband i.e., a dhimmī wife can confer iḥṣān only upon her Muslim husband but not upon herself. (i.e. muḥṣina).

5 - Iḥṣān is open to free spouse of different religions. But, in case of mixed marriage, iḥṣān is restricted to a non-Muslim wife. In other words, a Muslim husband can confer iḥṣān upon his dhimmī wife but not upon himself (i.e., he is Muḥṣin but not Muḥṣan).

Having provided us with this sketch, Abū Yūsuf goes on to give us his own view on the subject. His preference is for numbers -1- and -5-.<sup>22</sup> "This," he proclaims, "is the best of what we have heard on this issue."<sup>23</sup> Three names are immediately mentioned to support this view: Nakha'ī, Sha'bī (d.110) and Ibn 'Umar (authority of Medina, d.73 or 74).<sup>24</sup> Thus, as far as Abū Yūsuf was concerned, the status of iḥṣān could be conferred upon a free non-virgin Muslim, or a non-Muslim spouse, or could be attained by a free non-virgin Muslim spouse, by virtue of consummated marriage. Two things should be noted here. First, there is no prophetic ḥadīth or Quranic verse adduced to substantiate any

opinion. Secondly, slave spouses have been unanimously denied the right of acquiring or conferring iḥṣān. We may now look at the attitude in the Hijāz for the same period.

Mālik's view concerning iḥṣān is similar to that of Abū Ḥanīfa.<sup>25</sup> However, unlike Abū Ḥanīfa, he extends it to include slaves as being capable of conferring iḥṣān upon their free Muslim spouses.<sup>26</sup> He claims that this was the view of all those people with whom he had contact.<sup>27</sup> Nevertheless, he restricts the power of conferring iḥṣān to Muslim slaves only, for, as far as he was concerned, non-Muslim slaves could not be espoused by a Muslim. They should always be retained as concubines and not be taken as wives.<sup>28</sup> He arrives at this conclusion by applying two different Quranic verses:

And you may marry well reputed believing women (muḥṣanāt mu'mināt) and well reputed women of those people who were granted the Book before your time (wa al-muḥṣanāt min alladhīn ūtū al-Kitāb min qablikum) (Q.5:5)

"These," Mālik claims, "are the free Jewish or Christian women. Then God said:

And if any of you have not the means wherewith to wed free believing women, he may wed believing girls from among those whom your right hand possesses. (Q.4:25)

"These," he concludes, "are believing maids. Therefore, it appears to me that Muslims are forbidden to marry Jewish and Christian slaves."<sup>29</sup>

Curiously enough, Mālik never assented to the view that a non-Muslim spouse can attain the status of iḥṣān, despite the fact that

he knew, and indeed commented upon, Q.5:5, in which the women belonging to the People of the Book have unequivocally been described as muḥṣanāt. For Mālik, muḥṣanāt here means: free (!), like his Irāqī fellow jurists, Mālik was commenting upon a fiqh situation. He provides a special chapter dealing with the question of iḥṣān, not in the ḥudūd section but in the nikāḥ (marriage).<sup>30</sup> Three authoritative names in Medina are involved. Ibn Musayyib (d.93 or 94)<sup>31</sup>, al-Qāsim b. Moḥammad (d.106),<sup>32</sup> and Zuhri (d.124).<sup>33</sup> Ibn Musayyib is credited with the view that: iḥṣān is restricted to marriage and chastity. "This," he is claimed to have said, "is because God has forbideen zinā."<sup>34</sup> Al-Qāsim and Zuhri are alleged to have said that "a slave wife is capable of conferring iḥṣān upon her free husband." Mālik endorses this by saying that this is the general view of all the scholars he had met.<sup>35</sup> However, he finds this inadequate to cover other theoretical cases. Thus, he adds "a slave husband is capable of conferring iḥṣān upon his free wife, but a free wife cannot confer iḥṣān upon her slave husband."<sup>36</sup> Similarly, a free Christian or Jewish wife can confer iḥṣān upon her Muslim husband but not vice versa.<sup>37</sup> Thus, as far as Mālik was concerned, iḥṣān is restricted to, and attainable by, a free Muslim spouse by virtue of his/her lawfully consummated marriage.<sup>38</sup> to a Muslim spouse or to a free non-Muslim woman. Christians and Jews, who enjoy the status of dhimma cannot attain the status of iḥṣān; their sinners should be referred to their respective religious leaders unless they have publicized their crime/s, in which case they should be punished under the law of public indecency.<sup>39</sup>

Mālik's denial of iḥṣān to slaves, males or females, and to non-Muslim wives, all the while vesting in them the power of conferring iḥṣān upon their respective free Muslim spouses, arose from the general fiqh situation in Medina at his time: that consummated marriage plus

Islām and liberty are the main criteria for iḥṣān. The exclusion of non-Muslims from acquiring iḥṣān for themselves arose practically from a juridical point of view that the jurisdiction of the people of the pact, known as dhimmis, should be left in the hands of their respective religious leaders. Similarly, his view concerning slaves arose from two not unrelated juridical considerations. First, his observation that no slave had ever been stoned to death for zinā, and, secondly, from earlier Ikhtilāf in Medina and Mecca concerning the punishment of slaves for zinā.

The Meccans, Ṭāwūs (d.106) and ‘Aṭā’ (d.114 or 115), for instance, maintained that slaves should never be punished. The only exemption is a slave woman, who, if married to a free husband, should be flogged fifty lashes. This is her iḥṣān in accordance with the Q.4.25.<sup>40</sup> The Medinians accepted the latter view but not the former. They maintained that a slave married to a free woman is muḥṣan. Hence, if he fornicated, he should be stoned to death.<sup>41</sup> Mujaḥid (d.104) proclaimed publicly that this was the general view of the Medinians when he visited the city.<sup>42</sup> A similar view was held by Awzā‘ī (a Syrian scholar, d.157).<sup>43</sup> Both views have one thing in common, namely, that marriage is the decisive criterion for both cases. Mālik, undoubtedly familiar with the situation, tried to harmonize the two conflicting opinions by asserting that slaves - male or female - can never attain iḥṣān for themselves. Assuming they can, then their iḥṣān must be viewed, and interpreted accordingly, in light of three main criteria: Marriage + Liberty + Islām. For Muslim slaves, marriage will qualify them for 50 lashes; otherwise, no punishment is to be inflicted upon them for the lack of liberty. If they are married to free born spouses, then only free spouses will qualify for iḥṣān by virtue of attaining those three main criteria. For non-Muslim slaves, Islam will qualify them for 50 lashes,



otherwise no punishment is to be inflicted upon them. There is no question of marrying a non-Muslim slave. In short, Mālik's view of iḥṣān agrees with categories 1 and 4 above, but adds a novelty; namely a slave spouse can be muḥṣin/muḥṣina but not muḥṣan/muḥṣana. We may call this Category 6 of iḥṣān.

Now, as we have seen, Mālik's discussion on the question of iḥṣān was entirely invested in the Book of Marriage, with an appropriate rubric: Bāb mā jā' fī al-iḥṣān. The rubric itself signifies the authoritative definition of iḥṣān.<sup>44</sup> Two techniques have been employed: appealing to early authority and - in a desperate effort to enforce that authority - resorting to a limited scriptural exegesis. Similarly, his exclusive discussion of the definition of iḥṣān under the Book of Marriage shows that marriage is an indispensable ingredient for iḥṣān.<sup>45</sup> It is worth recalling here that no prophetic authority has been involved. His highest authorities were Ibn Musayyib, al-Qāsim b. Moḥammad and Zuhri, together with the claim of having the support of all contemporary Medinian scholars, which in itself envisages a considerable awareness of Ikhtilāf prior to, or even including, his own era. Nevertheless, having laid down his view on the meaning of iḥṣān, his next step was to acquire vivid examples of why the SP was, or should be, applied. The interests were vested with the authority of three pericopes incorporated in the ḥudūd section: A - The story of 'Umar; B - A story ascribed to Abū Bakr; and, finally C - A story ascribed to the Prophet. Each of these stories demonstrates that the presence or absence of iḥṣān was the criterion for the application, or commutation, of the SP to flogging, respectively. With respect to the story of 'Umar, I had pointed out that the composition of the story in general and the inclusion of the "iḥṣān" notion in particular were the product of later highly specialised jurists as a result of their reaction to, and campaign

for, the anti-SP forces.<sup>46</sup> This leaves us with the remaining two stories to look at briefly.

Abū Bakr's story runs as follows: Mālik is reported to have said that: "On the authority of Nāfi' (d.117),<sup>47</sup> Ṣafiyya bint Abī 'Ubayd (d. 50)<sup>48</sup> informed him saying: "A man who had fornicated with a virgin slave and thus made her pregnant was brought to Abū Bakr. The man - who was not muḥṣan (wa lam yakun aḥṣan) - confessed the crime. Abū Bakr ordered him to be flogged and then banished him to Fadak."<sup>49</sup>

The phrase: wa lam yakun aḥṣan, which is incorporated right at the end of the story, is not only alien to the flow of the story but also tendentious in tone. I see no grounds for describing the maid as bikr but the man as 'not muḥṣan'. The employment of muḥṣan for the culprit is definitely a deliberate attempt to show that had he been muḥṣan, he would have been stoned to death. The story was designed to demonstrate the technicality of iḥṣān. For obvious reasons, the story never gained access to the Classical Collections.

Our final story designed to serve a similar interest is one ascribed to the Prophet.

Abū Huraira and Zayd b. Khālīd al Juhany were claimed by Zuhri to have said that:

"The Prophet was asked about a slave woman; 'If she had fornicated before becoming muḥṣina what should be done with her?'

The Prophet replied:

'If she fornicates, flog her. If she fornicates again, flog her and, if she fornicates yet again, flog and then sell her, even for the price of a piece of rope.'" <sup>50</sup>

The juridical claim behind the pericope is that under no circumstances should a slave woman guilty of adultery be stoned to death. She should always be flogged. If she persists in committing the crime, then she should be sold even for a trivial price. Muḥammad's failure in his reply to repeat the condition posed in the question: "before becoming muḥṣina" signifies that the question of her iḥṣān is irrelevant. Slave women are to be flogged as long as they are slaves. This is compatible with Mālik's view concerning slaves. It also explains why Mālik, who never assented to the view that slaves can ever attain the status of iḥṣān, had, nevertheless, transmitted this story. In fact, the phrase which reads: wa lam tuḥṣin could be thought to have provided the key word for the promulgation of the pericope. The reading of the term in the active form confirms Mālik's opinion that Muslim slaves could only be flogged when they attained chastity, and non-muslim slaves, when they attained Islām. Ṭaḥāwī (a staunch Ḥanafite scholar, d.310) had explicitly accused Mālik of deliberate insertion of the phrase to serve his own purpose. "All traditionists have transmitted the pericope without it," he says. <sup>51</sup> What Ṭaḥāwī fails to recognize is that all traditionists have in fact adopted Mālik's story, and hence it is more likely that they edited it out as counter-action to Mālik's view. <sup>52</sup> Thus, neither Mālik's version nor the later improved versions has any claim to authenticity. For just as it could be argued that later versions were improvements of the early version, made in order to

accommodate later juridical attitudes, so it can be argued that Mālik's version - the earliest of all - was also produced to accommodate the contemporary situation.

Now, the arguments of the Irāqis and the Medinians had primarily helped Shāfi'ī to reconsider the whole issue of iḥṣān and to offer his own opinion on the circumstances which qualify an adulterer or adulteress for the punishment.

Like his predecessors, Shāfi'ī supports the view that iḥṣān is a decisive factor for the application of the SP. However, he states that "Iḥṣān is a generic term covering a wide range of meanings all of which might be interpreted more generally as forms of constraint against doing that which is prohibited. Thus, Islām is a constraint. Similarly, freedom is also seen as a constraint. Likewise a husband, consummated marriage and house arrest; everything which stands as a constraint takes on the meaning of iḥṣān. For instance, God says: 'It was We Who taught him (David) the making of coats of mail for your benefit, to protect you (li-tuḥṣinakum) from each other's violence' (Q.21:80). And also, 'They will never fight you together collectively except in fortified townships' (Q.59:14). Shāfi'ī concludes by pointing out that it is the context of the statement which determines the specific meaning of iḥṣān.<sup>53</sup> He does not, however, accept the view that Islām is one of the conditions for acquiring or conferring iḥṣān, although he would prefer sending dhimmīs to their own confessional courts, unless they insist on being tried by a Muslim judge, in which case Islamic Law must be applied.<sup>54</sup> Similarly, he does not accept the view that slaves can never acquire iḥṣān. To do so would entail either invalidating Q.5:25 or submitting to one of the most compelling arguments raised by the anti-SP forces, namely Q.4:25, which deals with the punishment of slave girls

guilty of adultery, states that "on their becoming muḥṣana/muḥsina, they should be subjected to one half of the punishment awarded to the muḥṣanāt free women. Stoning to death cannot be halved, for one person may die after a single stone, while another may survive one hundred, and so on. It therefore goes without saying that one hundred lashes as set by the Q.24:2 is the only just claim for zinā.<sup>55</sup> In order to maintain the validity of the Q.4:25, at the same time, to dispense with the logical argument put forward by the anti-SP forces, Shafi'i adopts a similar technique to get out of the dilemma. First, he employs the very verse which indisputably sets explicit punishment for zinā: Q.24:2. Next, he uses the very verse which was used by the anti-SP forces to invalidate the SP: Q.4:25. Then, comes the very argument, which he twists to his own ends. He argues that the fact "that death by stoning can be achieved through one stone to one thousand stones and more, is a clear proof that the punishment of muḥṣan slaves is different from that of free muḥṣan culprits, and that 50 lashes is the punishment of slaves when they attain the status of iḥṣān.<sup>56</sup> Married or not, slaves are neither to be stoned nor flogged.<sup>57</sup> Their iḥṣān is not derived from marriage but from their becoming Muslims.<sup>58</sup> Conversely, the iḥṣān of free persons derives from their consummated marriage. Hence, they can both acquire it and confer it upon their spouses - unlike slaves who can only acquire it for themselves by virtue of their conversion to Islām."<sup>59</sup> Although Shāfi'ī fails to quote a single prophetic ḥadīth in which the term iḥṣān or its derivative is defined, let alone mentioned, he tactfully manages to do so by showing that those who were simply flogged were non-muḥṣan. "Asīf was flogged and banished for a year, while the wife of the employer was stoned to death. So were Mā'iz and the Jewish couple." Furthermore - and this is most important for Shāfi'ī - "the Prophet was asked about the punishment of slaves, whereupon he replied, without mentioning iḥṣān, that they should always be flogged."<sup>60</sup>

Discussing the question of dhimmīs, Shāfi'ī dismisses religious affiliation as condition for iḥsān. His main concern is to establish the origin of the SP in Islām. To achieve that, as we shall see later, he selected incomplete verses to show that Muḥammad's judgement over the Jewish couple was Islamic Law. Shāfi'ī argues: "God has advised His Prophet, with reference to the people of the Book, saying: '....If they do come to you, either judge between them or decline to interfere. If you decline, they cannot hurt you in the least. If you judge, judge between them or decline to interfere. If you decline, they cannot hurt you in the least. If you judge, judge between them in accordance with justice; for God loves those who judge in justice.' (Q.5:42) Al-qist is the Truth which has been revealed by God to His Prophet. For God has said: 'And judge between them by what God has revealed to you and follow not their vain desires, but beware of them, lest they beguile you from any of that which God has sent down to you ....' (Q.5:59). This is precisely what the Prophet did in the case of the Jewish couple."<sup>61</sup> Shāfi'ī deliberately ignores succeeding verses which would otherwise betray his interpretation. Q.5.43 says: "But why should they come to you for decision, when they have their own Torah within which there is the Decision of God - Hukm Allāh - .... It was We Who revealed the Torah: therein are guidance and light. With it, the Prophets and the Muslims judged the Jews. So did the Rabbis and masters of law; for to them was entrusted the protection of God's Book. (Q.5:44) (cf. Q.5:46-48)

However, Shāfi'ī shows complete awareness of the contents of these verses. He distinguishes between dhimmīs and non-dhimmīs. "Those who were involved with Muḥammad in Medina were persons in a treaty relation with Muḥammad. When they brought the case of the JC to Muḥammad they sought judgement in his capacity of ḥakam."<sup>62</sup> He applied the Islamic Law sic. Dhimmīs should be referred to their religious leaders as part of

their dhimma: wafāʾan bi dhimmatihim.<sup>63</sup> Only when they insist on being judged by Muslims, could their desires be granted by applying an appropriate Islamic Law."<sup>64</sup> Shāfiʿi's view on iḥṣān is much wider than those of his predecessors. To him, iḥṣān is open to free spouses by virtue of their consummated marriage, but can also be attained by slaves by virtue of their conversion to Islam. This is category -7- of iḥṣān. In other words, Shāfiʿi adopts some parts of category -4- and -5- and then reverses Mālik's novelty in category -6- to formulate a "new" technical meaning of iḥṣān.<sup>65</sup> We may now look at the possible main reason for adopting this generic term rather than any of the other possibilities and for making it a technical criterion for the justification of the SP.

We have seen that no one has ever been able to quote a prophetic ḥadīth which defines, let alone mentions, iḥṣān as the criterion for the application of the SP. We have also seen that all views concerning iḥṣān rest upon three antitheses: Consummated marriage / virginity, liberty / Slavery and Islām / Dhimma. (Thayyib / Bikr - Hurriya / ʿUbūdiyya - or Hurr / ʿAbd - and Muslim/Dhimmi). Like muḥṣan and its derivatives, all these words have been employed by the Qurʾān in different contexts. Thayyibāt v. Abkārā, Q.66:178 with reference to marital status.<sup>66</sup> Hurr v. ʿAbd, Q.2:178 with reference to retaliation.<sup>67</sup> As for Muslim, the Qurʾān is copious: to mention but a few: Q.3:67; 12:101, 2:128 .... Only Dhimmi has no mention in the Qurʾān. However, there is a semantic root of Dhimmi. Q.9:8 uses dhimma with reference to covenant or pact. In any case, ahl al-kitāb, which is abundant in the Qurʾān could take the place of Dhimmi.<sup>68</sup> Why then was none of these terms used as the decisive factor/s for the SP? To understand the advantage of iḥṣān, one has first, I believe, to view the context within which iḥṣān or its derivatives occurs in the Qurʾān and, secondly, to examine closely both

the language and form used by the anti-SP party to dismiss the validity of the SP.

Now, it is true that the term iḥsān does not occur in the Qurʾān. Nevertheless, its derivatives have been used in various ways. We have already seen those five instances, some of which were used by both Mālik and Shāfiʿī (Q.59:2, 14; 21:80; 4:25 and 5:5). Q.4:25 and 5:5 are the only instances worthy of retention here, and they are included in the following list of occurrences and their respective contexts:



USAGE	LOCATION	CONTEXT
a- Muḥṣanāt	Q.24:4	Punishment for accusing <u>muḥṣanāt</u> women ( <u>qadhf</u> ) <u>muḥṣanāt</u> = well reputed.
b- Muḥṣanāt	Q.4.25	The punishment applicable to <u>muḥṣanāt</u> is the criterion, half of which is the punishment to be applied to maids <u>muḥṣanāt</u> (cf. Q.24:2). <u>Muḥṣanāt</u> = well reputed.
c- <u>Uḥṣinn aḥṣann</u> (slaves)	Q.4:25	See the context of -b- above
d- <u>Muḥṣanāt</u> + <u>ghāfilāt</u>	Q.24:23	<u>Qadhf</u> of innocent women, <u>muḥṣanāt</u> = well reputed
e- <u>Muḥṣanāt</u> + <u>al-Nisā'</u>	Q.4.24	Types of women one is prohibited to marry. <u>muḥṣanāt</u> = possibly those who are already under marriage protection.
f- <u>Muḥṣanāt</u> + <u>mu'mināt</u>	Q.4.:25	Concluding marriage <u>muḥṣanāt</u> = well reputed
g- <u>Muḥṣanāt</u> + <u>mu'mināt</u>	Q.5:5	Type of women one is recommended to marry. <u>Muḥṣanāt</u> = well reputed

USAGE	LOCATION	CONTEXT
h- <u>Muḥṣanāt</u> + <u>..al-Kitāb</u>	Q.5:5	Do. (women of the <u>ahl-</u> <u>al-kitāb</u> cf. -g- above).
i- <u>Muḥṣanāt</u> + <u>ghayr musāfiḥāt</u>	Q.4:25	Concluding marriage. <u>Ghayr musāfiḥāt</u> = not or ill repute. i.e. it emphasizes <u>muḥṣanāt</u> .
j- <u>Muḥṣinin</u> + <u>ghayr musāfiḥin</u>	Q.4:25	Concluding marriage. Cf. the context of -i- above.
k- <u>Muḥṣinin</u> + <u>ghayr musāfiḥin</u>	Q.5:5	Do.
l- <u>Fatayāt</u> .... <u>in aradna</u> <u>taḥaṣṣunan</u>	Q.24:33	Prohibition of forcing or inciting one's maids into prostitution, while the maids themselves desire good reputation.

The above table outlines the Qur'anic employment of the term iḥṣān. With the exception of Q.5:5 (usage -h- above - employed by Mālik) none of these verses had been used or adduced by the pre-Formative period scholars in their discussions of adultery. The involvement of these verses, or some of them, in juridical discussions pertinent to our subject begins with Shāfi'ī. Most of his arguments were later adopted by other polemicists or exegetes either to support the views or to ridicule

them and hence to support the views of his adversaries.<sup>69</sup> Yet, as we have seen above there is no single verse which exclusively bears the meaning of liberty or its opposite, or Islām or dhimma. Nor do we find the meaning of "being deflowered" as the general concept of iḥṣān. In all probability, protection and chastity are the most exclusive concepts to be found within iḥṣān.<sup>70</sup> The reason that pro-SP forces centred their arguments around the term iḥṣān, rather than other more appropriate possibilities, is that they had to respond to the objection phrased in the same fashion that SP not only figures nowhere in the Qur'ān but also contradicts the only punishment mentioned therein.<sup>71</sup> Furthermore, Q.4:25 (usage -c- above) indisputably endorses the content of Q.24:2; for it states that the maids should suffer only half the punishment applied to free women, if either of them was muḥṣana.<sup>72</sup> SP cannot be halved. Thus, since the anti-SP forces approached the issue from this angle, the fuqahā tried to impose their doctrine by using the same means and language. It was unavoidable. This is particularly so, because the only word used by the Qur'ān within the context of the punishment for zinā or qadhf was iḥṣān.<sup>73</sup> Since the objection was centered upon, and argued from within, the Qur'ān, the reply was developed and fought from within the same source. It was the task of the Classical Period scholars to interpolate this notorious "technical" term into the hadīths, some of which were already known by the Pre-Formative and Formative Period scholars, but not with that terminology. It is precisely this point that allows one to say with some conviction that whenever the term iḥṣān appears in those pericopes analyzed earlier, its presence is tendentious and hence an interpolation.<sup>74</sup> Similarly, the employment of ṭhayyib, which we have seen in the Mā'iz pericope reported by Mālik,<sup>75</sup> is nothing but an earlier attempt in response to the same situation. The term appeared to be weak and was soon abandoned in favour of iḥṣān.<sup>76</sup> Post-Classical scholars interested in inter-schools discussions were

thus left to defend the views of their masters against others. Sarakhsī, for instance, reports a prophetic ḥadīth in which the Prophet is claimed to have said:

He who associates anything with God cannot be/is not muḥsin.<sup>77</sup> (man ashraḳa bi Allāh fa laysa bi muḥsin)

Similarly, he introduces another prophetic ḥadīth in which the Prophet is alleged to have advised one of his Companions, Ka'b b. Mālik, who wanted to marry a Jewess, saying:

"Do not! She will never confer Iḥṣān upon you."<sup>78</sup>  
(da'ḥā fa innahā la tuḥsinuk)

Suyūṭī, a Shāfi'ite scholar (d. 991 A.H./1505 A.D.) shamelessly alleges that the Prophet had said:

There are two types of iḥṣān. Iḥṣān based on chastity and iḥṣān based on marriage."<sup>79</sup>  
(al-Iḥṣān iḥṣānān: Iḥṣān 'afāf wa iḥṣān nikāḥ).

So much for the discussion concerning iḥṣān. But, as we have seen, the attempts to justify the SP were centered not only upon iḥṣān, but also upon the source of the SP. Four possible sources were exploited and, depending on both time and space for the arguments of the anti-SP, the emphasis of either source argued by the fuqahā and Traditionists differed in the adoption of one source or more than one sources. The sources involved were: the Torah, the Sunna of the Prophet, the Qur'ān and Hukm Allāh, i.e., the Universal Law of God. Again, the debate on this issue is long and complicated.

All scholars up to and including Shāfi'ī were of the opinion that the source of the SP was the Sunna of the Prophet. Abū Ḥanīfa, however, was claimed to have argued that the Prophet had stoned the Jews on the basis of the Torah.<sup>80</sup> Hence, he was applying not Islamic law but rather the Jews' own law according to their own Scripture. On this basis, Abū Ḥanīfa refused to apply Islamic Law to Dhimmis, partly because SP is not the law of every Dhimmi and partly because, according to dhimma, the protected minorities should be left free to exercise their own beliefs and observe their own laws. This was the practice in the Iraqi region. To substantiate his arguments, Abū Ḥanīfa denied non-Muslims the right to acquire or confer, iḥṣān. Ibn Abī Laylā did not accept that a Muslim judge has no jurisdiction over Dhimmis for adultery. His view was endorsed by Abū Yūsuf, while the view of Abū Ḥanīfa was supported by Shaybānī. Although Ibn Abī Laylā was of the opinion that the protected minorities should be left alone both in their beliefs and in their laws, he made an exception of the question of adultery.

Mālik followed the practice. However, to find the justification of Muḥammad's case with the Jewss, which he now reports in greater detail, he argued that at the time of the incident, the Jews had no dhimma.<sup>81</sup> Hence, the outcome of that incident cannot be extended to the jurisdiction of Dhimmis. The Medinian Jews went to Muḥammad seeking his personal judgement. He knew that they came to him to examine his prophetic claim. Thus, he first challenged them to bring the Torah and then applied his prophetic judgement which coincided with the Torah. The source of the SP then is not the Torah but the Sunna of the Prophet.<sup>82</sup> To this end, Mālik reports a number of prophetic incidents, the most important of which is the story of the hired-hand. There, the first attempt to ensure Muḥammad's practice as pure Islamic Law was developed with the help of "kitāb Allāh".<sup>83</sup> We have no idea

what this phrase meant to Mālik. But we are almost certain that it did not mean the Qur'ān. If it did, then Mālik must have concealed this fact from his students leaving them to discover it for themselves. Surely, Shāfi'ī had never understood it that way. Nevertheless, the phrase was persuasive enough for some scholars from the Classical Period onwards to assert that the source of the SP was the Qur'ān.<sup>84</sup>

Noting what his predecessors had failed to note, that accepting the claim that the Prophet had stoned the Jews according to the Torah would further jeopardize the justification of the SP in face of the most compelling arguments raised by the anti-SP forces, Shāfi'ī sought different arguments. He first introduces a distinction between persons in treaty with Muḥammad (muwāda'īn) a notion he borrowed from Mālik - and the dhimmīs, about whom he now defines the institution of ahl al-Dhimma under the jizya.<sup>85</sup> "We have no information whatsoever," Shāfi'ī argues, "about the Prophet's judgements over Dhimmīs. Yet, it is impossible that the Prophet had never passed his judgements in litigations involving Dhimmīs. For Dhimmīs, who were living in Khaybar, Fadak, Wādī al-Qurā, Mekka, and Yemen were ordinary people involved in all problems of life. They must have quarrelled among themselves and sought the judgement of the Prophet or his associates. If there had been any incidents of that nature, they would have been reported to us - if not all of them, then at least some of them. Yet, we have not a one. The only report we have is that of the incident of the Jewish couple who were in treaty with Muḥammad."<sup>86</sup> Thus, Shāfi'ī's first move was to deny the Jewish couple the status of dhimma. His next step was to justify the source of the punishment for that particular incident and at the same time to justify Muslim jurisdiction over Dhimmīs. He achieved this by

adducing different Qur'anic verses which bear the notion of mā anzalā Allāh and qist.<sup>87</sup> "This," he concludes, "is the meaning of God's commands when He said:

'If you want to judge them, then judge them in accordance with justice," and 'judge between them with what We have revealed to you.'

This should be applied to all non-Muslims when they seek the judgement of a Muslim judge."<sup>88</sup> In other words, Shāfi'ī was of the view that the source of the SP was the Sunna of the Prophet which was confirmed by God's command. In his desperate attempts to harmonize the inconsistencies of prophetic reports concerning the SP and flogging, Shāfi'ī resorts to the chronological order for the sequence of events. He argues that the first item to be revealed was Q.4.15 and 16, followed by the pericope of 'Ubāda, then the Q.24:2, followed by Q.4:25. Next came the story of Mā'iz, which was followed by the story of the hired-hand.<sup>89</sup> He completely ignores the story of the pregnant woman, or at least, as I have said before, he does not know it. Nor does he try to fix anywhere the story of the Jewish couple.<sup>90</sup> To do so would entail accepting that the SP was first revealed as Sunna and then abrogated by the Qur'ān, or vice versa. This was unthinkable to Shāfi'ī.<sup>91</sup>

Ibn Ḥanbal, who witnessed and indeed initiated the evolution of the Classical Period, took a different view. Some reports say that he was of an opinion similar to that of Shāfi'ī. Others claim that he advocated the concept that the Qur'ān was the source of the SP, but that the actual verse was abrogated while its hukm was retained.<sup>92</sup> Whatever one chooses to believe, by the time of the period of the Mu'tazila, a new wave of Prophetic hadiths was in circulation, the early stories were improved, edited or expanded and new ones were produced to meet new situations. Among these are the following:

'Abdullah b. Abī Awfā was asked: "Did the Prophet stone before or after the revelation of Q.24." Abdullah replied: "I do not know."

هل رجم رسول الله ؟ قال : نعم .  
قال : أبعد النور أم قبله ؟ قال : لا أدري ...

93

'Umar was credited with the story which identified the alleged verse.

94

الشيخ والشيخة إذا زنيا فارجموهما البتة .

Ubayy b. Ka'b was reported to have identified the Sūra which had previously contained the missing verse. <sup>95</sup>

كم تقرأون سورة الأحزاب ؟ قال : بضعا وسبعين آية .  
قال : كم تقرأون سورة الأحزاب ؟ قال : بضعا وسبعين آية .  
وأن قال : لقد قرأتها مع رسول الله (ص) مثل البقرة أو أكثر منها  
وأن فيها آية الرجم [ الشيخ والشيخة إذا زنيا فارجموهما البتة ... ]  
لقد نزلت آية الرجم ... فكانت  
تحت سريرى عند وفاة رسول الله (ص) فلما توفى ... دخلت داجن ... فأكلتها .

Others proffered different solutions to the problem. Hākim (d.405) for instance, transmits a hadīth alleged to date back to 'Umar, in which, an explanation of why the SV was never written down has been given. <sup>97</sup>



Marwān b. al-Ḥakam (d.65) was made to ask Zayd b. Thābit (d.c.45-55) why he refused to record the stoning verse in the Muṣḥaf. The latter replied: "Don't you see! If I wrote it down the non-virgin youth would be stoned to death ....!"<sup>98</sup>

By the end of the third century of the Hijra, the fiqh penalty had gained the upper hand and little attention was given to the voices of opposition.<sup>99</sup> Yet, the literature we possess reveal that prior to the Classical Period, various solutions to the Fiqh v. Qur'ān conflict were attempted. Pertinent to our subject is the notion of dual penalties.

#### CHAPTER XIV

JALD plus RAJM

AND

JALD plus NAFY

The question of inflicting two penalties upon one and same culprit was/is traditionally linked with the Story of ‘Ubada. The story itself, which was undoubtedly produced at the end of laborious endeavours to reconcile the Qur’ān- fiqh conflict, by appealing to Prophetic authority, was nevertheless employed by Shāfi‘ī as an example of elucidation (takhṣīs) of the Qur’ān by the Sunna and, at the same time, as an instance of the abrogation (naṣkh) of a previous Sunna by later Sunna.<sup>1</sup> Yet, the notion of dual penalties as a means of reconciliation is much older than both the Story of ‘Ubāda and Shāfi‘ī himself. It goes back to the pre-formative period in Iraq, though, strictly speaking the notion did not gain ground.

Abū Hanīfa, as well as his pupils and associates, rejected the idea of applying jald before rajm or nafy after jald. The former was based on Nakha‘ī’s reasoning that ‘Umar had stoned without flogging the culprit,<sup>2</sup> while the latter was based on a report ascribed to ‘Alī saying:

[حسبهما من الفتنة أن ينفيا]  
[كنى بالنفي فتنة]

Banishment should be stopped.

It leads to Fitna.<sup>3</sup>

The idea of jald plus rajm was based on the story of 'Alī who was claimed to have had a woman publicly flogged for adultery and then to have had her stoned to death. When someone protested against this innovation, 'Alī was claimed to have rebutted the opposition by saying:

جلدتها بكتاب الله ورجمتها بسنة  
رسول الله صلى الله عليه وسلم.

I have flogged her in accordance with the Book of God and stoned her in accordance with the Sunna of the Prophet.<sup>4</sup>

In other words, the justification for such undertaking was based on applying the Quranic law and following Prophetic practice. Among those names associated with this notion are those of 'Abd al-Rahman bin Abī Laylā (d.148)<sup>5</sup>, Ibn Jurayj (d.150)<sup>6</sup>, Qatāda (d.117)<sup>7</sup>, Sufyān, Ḥasan bin Ḥayy (d.169)<sup>8</sup> and Sha'bī (d.110)<sup>9</sup> - the sole authority for transmitting the story of 'Alī.<sup>10</sup> In addition to the authority of 'Alī quoted for this doctrine, the names of Ibn Mas'ūd (d.33) and 'Ubayy b. Ka'b (d.c. 19-32) are also used. Nevertheless, most of the Irāqīs had rejected this doctrine, for it appears to have been imposing a more severe punishment. Others produced a counter tradition going back to Ibn Mas'ūd, based on the principle that "Capital punishment takes precedence over lesser punishments" (Idhā ijtama' ḥaddan lillāh ta'ālā, fīhima al-qatl, uḥīṭ al-qatl bidhālik.<sup>11</sup> Sarakhsī (d. 483), arguing for Abū Ḥanīfa, states that combining flogging and stoning for muḥṣan is neither

lawful nor logical: it serves no purpose. For punishments are imposed as a deterrent and this effect can be achieved without adding flogging to stoning, which has been established by the Prophet. <sup>12</sup>

Like the Irāqīs, Mālik too rejected the doctrine on the basis that it contradicts the established Sunna. <sup>13</sup> A similar attitude was ascribed to Zuhri (d.124) who strongly disapproved by saying: "The Prophet had stoned. Never did he mention flogging." <sup>14</sup>

Shāfi'ī, who only incidentally discusses the Story of 'Alī, transmitted by the Irāqīs, in order to point out the contradictions between the Iraqi doctrine and the Irāqī authorities - 'Alī and Ibn Mas'ūd <sup>15</sup> - joins the jamhūr on the basis that every well-authenticated tradition going back to the Prophet has an over-riding authority and takes precedence over the opinions of his Companions, their Successors, and later authorities. <sup>16</sup> He accepts that jald plus rajm had once figured in the Islamic Law but his submission to this fact is based, not on the Story of 'Alī, which he regards as an incident of applying an abrogated law, but on the fact that jald plus rajm was the earliest declaration made by the Prophet in order to elucidate the general meaning of Q.24:2, and to establish his Sunna for the SP. However, the dual punishment was then abrogated by the Prophet himself when he stoned Mā'iz without flogging him first and when he gave his orders to stone the wife of the man involved in the Story of the hired-hand, if she confessed to having committed adultery, without saying that she should be flogged first. Thus flogging for the thayyib was abrogated, but stoning was retained. <sup>17</sup> His continual insistence on this point shows that the story of 'Ubāda, which he now manipulates to fit his systematic reasoning, could not yet have been known to his predecessors. Similarly, their opposition to the doctrine of jald plus rajm speaks volumes for the

nature of the doctrine which was primarily based on juridical endeavour to reconcile the Quranic-Fiqh conflict. Subsequently, the story of 'Alī, which was known to, but whose implication was rejected by, the Irāqīs, <sup>18</sup> appears to be the source of that attempt. Its failure to gain the support of the so-called jamhūr during the pre-formative period could be attributed to two points. Its failure to accommodate the iḥṣān criterion, which, as we have seen, was determined by both the language and the form of the anti-SP party and by introducing a more severe punishment which had no precedent in the living tradition. It was only during the Classical Period that the former problem was accommodated by the assertion that the woman, who had even come to be identified as Shirāḥa of Hamdān tribe, was in fact married and she became pregnant while her husband was away in Syria. <sup>19</sup> This sort of improvement, together with the circulation of the story of 'Ubāda, led some classical scholars, such as Ibn Ḥanbal, <sup>20</sup> Ishāq b. Rāhwayh (d. 238) and Dāwūd al-Zāhiri (d. 270) to favour the doctrine of jald plus rajm for muḥṣan. <sup>21</sup> Hence, the problem of having no precedent was solved by making 'Alī fulfil the Prophetical declaration.

#### Jald plus nafy:

The dual quality of the jald plus rajm punishment for the non-virgin was probably the reason for constituting the similar two-fold punishment of jald plus nafy for the virgin culprit. For while jald alone is mentioned in the Qur'ān, the doctrine of banishment as part of the punishment for fornication was known to the ancient Iraqis as a common practice which could be exercised by a judge at his discretion. <sup>22</sup> Abū Ḥanīfa, however, like Shaybānī and Abū Yūsuf, said on the authority of Nakha'ī: "Banishment might lead to a further infringement of the law." <sup>23</sup> Ibn Abī Laylā, on the other hand endorsed the practice and

rebutted the doctrine of Abū Ḥanīfa by saying that: "The Prophet had banished, so did Abū Bakr and 'Alī." <sup>24</sup> Sufyān al-Thawrī (d. 161) supported the doctrine of Ibn Abi Layla by transmitting a ḥadīth in which 'Alī(!) is claimed to have banished a culprit from Kūfa to Baṣra. <sup>25</sup>

Mālik accepted the doctrine of banishment for non-muḥṣan but only for males. His acceptance is based on the story of 'Asīf (the hired-hand) in which the employee was ordered by the Prophet to be flogged one hundred lashes and then to be banished for a year. But Mālik refuses to extend this punishment to female culprits. His denial of such practice is based on two grounds. First it was not an accepted practice to let a woman go away alone. Secondly, he knew a tradition going back to the Prophet in which the latter was claimed to have said: "No woman should travel unless accompanied by a near relation" (La tusāfir al-mar'at illa wa ma'ahā dhū mahram). <sup>26</sup> Since banishing a woman would also require sending away an innocent male relative and hence punishing him for a crime he never committed, Mālik categorically refused to implement nafy for female culprits. Shāfi'ī attacks both the Irāqīs and Mālik for refusing to implement banishment as an additional punishment of the non-muḥṣan culprit. His argument with the Irāqīs is similar to his discussion with reference to the story of 'Alī, <sup>27</sup> while his reply to Mālik is based on the argument that the latter had failed to distinguish between a voluntary journey and an obligatory exile. <sup>28</sup> Shāfi'ī, however, remains silent concerning a journey for pilgrimage, which once set becomes an obligatory journey. Yet, he does not allow a woman to make a pilgrimage to Mecca unless she is accompanied by a male member of her family. Similarly, Shāfi'ī hesitated to banish slaves. For had he banished them, he would have been obliged to limit their banishment to a maximum duration of six months in accordance with the analogical conclusion of inflicting 50 lashes. However, he had no Prophetical

authority or otherwise to that effect. At the same time he realised that banishing slaves would cause harm both to the master, by denying him his right of service from his slave, and to the slave who had no personal possessions which would enable him to survive in exile. Realising that this was a major dilemma, he concluded by praying: "May God help me to settle this problem." <sup>29</sup>

Ibn Ḥanbal and almost all later jurists accepted the doctrine of jald plus nafy on the basis of the story of ʿAsīf, ʿUbāda, and on the account that Abū Bakr, ʿUmar, ʿUthmān and ʿAlī had carried out banishment as part of punishment for non-muḥṣan. <sup>30</sup> They also extended it to include slaves on the basis of qiyās. <sup>31</sup>

But the Ikhtilāf on jald plus nafy did not stop there. Ṭaḥāwī (d. 310) and Sarakhsī (d. 483) defended Abū Ḥanīfa's attitude by developing a new kind of argument. In addition to recalling the argument used by Abū Ḥanīfa himself, they point out that flogging, which was implemented by the Prophet himself, was established by Quranic ruling. Their discussion is based entirely on whether or not an addition (in this case the banishment in the story of ʿUbada) to the existing naṣṣ (in this case jald in the Q.24:2) is nāskh. Their conclusion is that such an addition would constitute abrogation:

## الزيادة على النص نسخ

In other words, Jald would have been abrogated by banishment, thereby constituting a further legal principle by which an isolated

Sunna could abrogate the Qur'ān. This they found unacceptable and hence banishment was categorically rejected. <sup>32</sup>

An interesting attempt to reconcile the Qur'ān-figh conflict is the doctrine of imposing an age criterion or the combination of both age and marital status criteria. The former is ascribed to Ubayy b. Ka'b, Abū Dharr and Masrūq - all of whom are Companions of the Prophet. It is based on the semantic implication of the word shaikh or shaikha interpreted as "mature". Thus jald plus rajm is the punishment of mature culprits. Rajm alone constitute the punishment of young non-virgins, while jald is the punishment of young virgins. <sup>33</sup> Some traditionists are claimed to have favoured applying jald plus rajm to the mature thayyib, thereby, both harmonising the meaning of shaikh and shaikha and fulfilling the distinction of iḥṣān. <sup>34</sup> This is how the jurists, the uṣūlis and the traditionists reacted to the anti-SP party who insisted that the punishment for zinā is nothing but flogging.

Among the most systematic arguments put forward to answer the objection of the anti-SP party and to salvage the position of the Sunna, are those of Shāfi'ī, the true founder of the principles of Islamic Law. A further interesting argument, which demonstrates his deep insight and remarkable ingenuity, is his innovation of ‘amm v. khāṣṣ in order to harmonise conflicting sources and nāsikh wa al-mansūkh in order to dismiss any material which could not be used for harmonisation. <sup>35</sup> For it was this innovation which helped him to re-interpret and finally re-arrange the chronological order of the ḥadīth materials dealing with zinā to coincide with his theory, though he also had to ignore other ḥadīths. Yet, as can be seen from my analysis of all those pericopes in question, together with the Ikhtilāf pertinent to the subject, the order of these traditions seems to be quite different from that of Shāfi'ī.

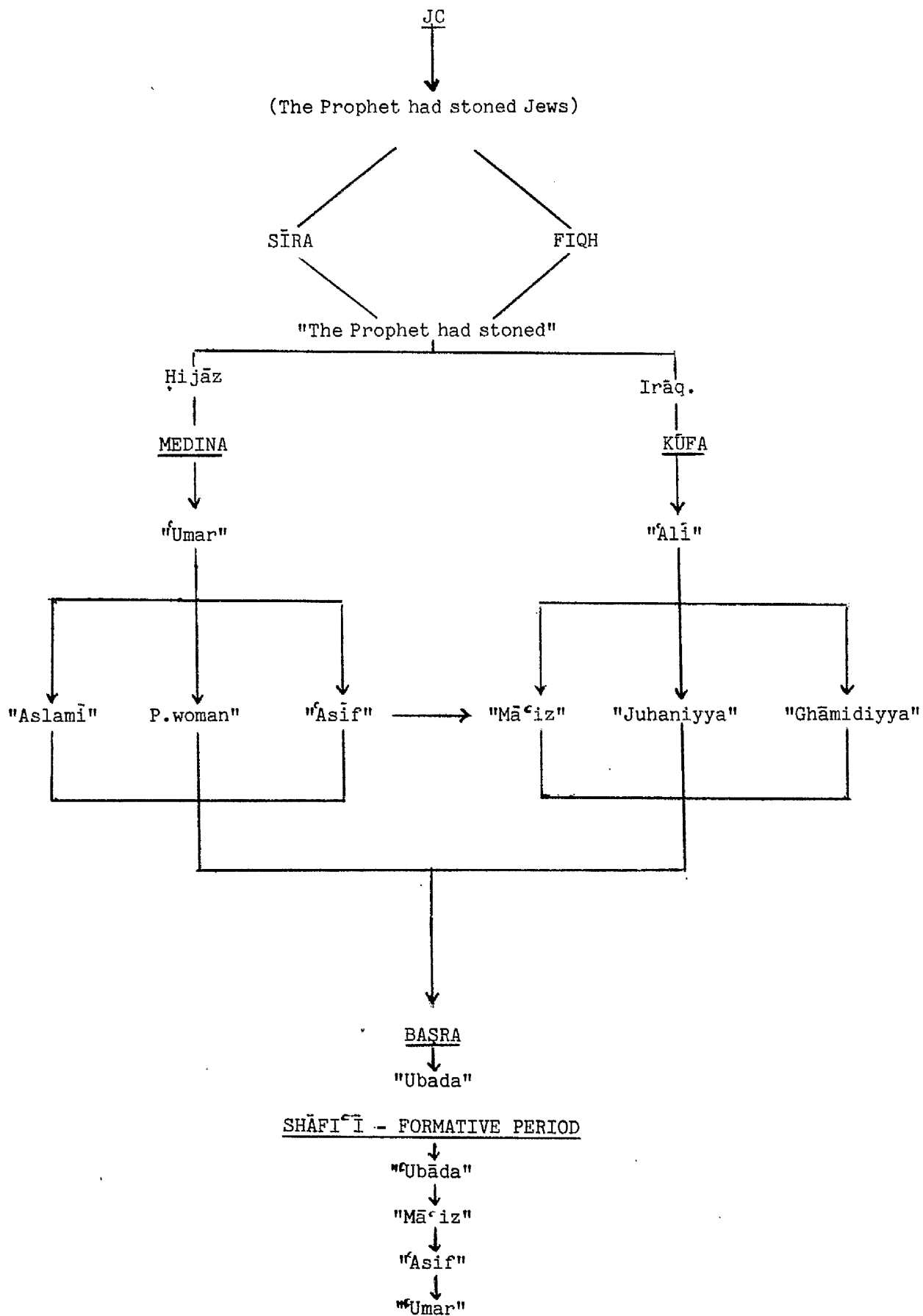


Just as the story of 'Alī was the first one produced to reply to the anti-SP party, the story of 'Ubāda was the last to appear for the same purpose. However, the appearance of a number of Prophetical ḥadīths dealing with punishment for zinā automatically led the story of 'Alī into oblivion, whereas the story of 'Ubāda, being a Prophetical one as well as the last to appear, survived in the discussions. <sup>36</sup>

The objection of the anti-SP party was caused by the claim that the punishment for adultery was the Stoning Penalty derived from the story that: "The Prophet had stoned Jews." This story, although originally circulated for a quite different reason, namely to establish the Prophetical credentials of Muḥammad, was soon adopted and furnished with details by both the authors of the Sīra/Maghāzī literature and the fuṣṭahā. Once in the hands of the fuṣṭahā, it was sufficient to establish Islamic Law on the basis that "The Prophet had stoned." Similarly, the claim that "The Prophet had stoned" sufficed to produce various stories with the same theme. Time and space also contributed to justify, refute, or support juridical inclinations. It seems to me, the true chronological order of all these stories, as they appeared in the Ikhtilāf of the fuṣṭahā, supported by the analysis of their contents and their inter-relationships, is more likely to be as they are shown in the diagram below.

By the time of the Classical period, the stories, despite their mutual incompatibility, were generally recognized as loci classici for the punishments of zinā. The story of the JC lost its general importance for the legality of the SP and was strictly confined to the area of dhimmis' jurisdiction. In contrast, the Story of the legendary Mā'iz assumed a predominant position in the discussions of the SP followed by the Story of the 'asīf. Both of them were equally employed in, and

developed for the inter-schools juridical discussions, occasionally substantiated by other stories, such as the Ghāmidyya, Juhaniyya and ‘Ubāda. The Story of ‘Umar was granted the concluding position; for "the Stoning Penalty is a just claim in the Book of God and was elucidated by the Sunna of the Prophet." <sup>37</sup> But as we have seen, the source of the SP is neither the Scripture nor, strictly speaking, the Sunna, but the <sup>38</sup> dispute about its legitimacy in the Islamic Law.



A synoptic chart for the pericopes in the ḥadīth compendia and other relevant works.

			Jewish Couple	Mā'iz	Ghāmidīyya	Juḥanīyya	ʿAsʿīf	ʿUmar	ʿUbāda	ʿAlī
Ibn Ishāq	d.150	<u>Sīra</u>	x	-	-	-	-	x	-	-
A. HANĪFA	d.150	ʿĀthār 1 ʿĀthār 2	- -	x x	-	-	-	-	-	-
MĀLIK	d.179	<u>Muwattaʿ</u>	x	x	- )Pregnant woman	- )Pregnant woman	x	x	-	-
A. Yūsuf	d.182	<u>Kharrāḥ</u>	x	x	x	x	-	-	-	x
A. Yūsuf		<u>Iktīlāf</u>	x	x	-	-	-	-	-	-
Shaybānī	d.189	<u>Muwattaʿ</u>	x	x	- )Pregnant woman	- )Pregnant woman	x	x	-	-
FORMATIVE PERIOD										
SHĀFIʿI	d.204	<u>Risāla</u>	x	x	-	-	x	x	x	-
SHĀFIʿI		<u>Umm</u>	x	x	-	-	x	x	x	x
Ṭayālīsī	d.204	<u>Musnad</u>	x	x	-	-	x	x	x	-
Sanʿānī	d.211	<u>Muṣannaf</u>	x	x	x	x	x	x	x	x
CLASSICAL PERIOD										
I. HANBAL	d.241	<u>Musnad</u>	x	x	x	x	x	x	x	x
Dārimī	d.255	<u>Musnad</u>	x	x	x	-	x	x	x	-
BUKHĀRĪ	d.256	<u>Ṣaḥīḥ</u>	x	x	-	-	x	x	-	-
MUSLIM	d.261	<u>Ṣaḥīḥ</u>	x	x	x	x	x	x	x	-
I. JAH	d.273	<u>Sunan</u>	x	x	x	x	x	x	x	-
A. DĀWŪD	d.275	<u>Sunan</u>	x	x	x	x	x	x	x	-
TIRMIDHĪ	d.279	<u>Jāmiʿ</u>	x	x	-	x	x	x	x	-
Bazzār	d.293	<u>Musnad</u>	x	x	x	-	-	-	-	-
NASĀʿI	d.303	<u>Sunan</u>	-	-	-	x	x	-	-	-
POST CLASSICAL PERIOD										
Ṭahāwī	d.310	<u>M. al-Āthār</u>	x	x	x	x	x	x	x	x
Ṭabarānī	d.360	<u>Muʿjam</u> S. A. K.	x x x	- x -	- x -	x x -	- - -	- - -	x - -	- - -
Dāraquṭnī	d.335	<u>Sunan</u>	x	x	x	x	x	x	x	x
Ḥākim	d.405	<u>Mustadrak</u>	-	x	x	x	-	x	-	x
Bayhaqī	d.458	<u>Sunan</u>	x	x	x	x	x	x	x	x
Baghawī	d.510	<u>Sharḥ Sunna</u>	x	x	x	x	x	x	x	-

Key for the sources: S. = Muʿjam al-Ṣaḥīḥ; A. = al-Awaṣṭ; K. = al-Kabīr; Āthār 1 = Abū Yūsuf's recension;  
 Āthār 2 = Shaybānī's recension.

**STUDIES IN THE COMPOSITION  
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## ABBREVIATIONS

Abhāth =	<u>al-Abhāth, Quarterly journal of the American University of Beirut.</u>
AO =	<u>Acta Orientalia.</u>
Bagh. =	<u>al-Baghawī, Sharḥ al-Sunna.</u>
Bay. =	<u>al-Bayhaqī, al-Sunan al-Kubrā.</u>
BEO =	<u>Bulletin d'Études Orientales.</u>
BJRL =	<u>Bulletin of the John Rylands Library.</u>
BSOAS =	<u>Bulletin of the School of Oriental and African Studies.</u>
Bu. =	<u>al-Bukhārī, Saḥīḥ al-Bukhārī.</u>
C.=	Chapter.
COE =	<u>Correspondance d'Orient: Études</u>
Concilium =	<u>Concilium Revue Internationale de Théologie.</u>
CQ, =	<u>J. Burton, The Collection of the Qur'ān.</u>
Daedalus =	<u>Journal of the American Academy of Arts and Sciences.</u>
Daraq.=	<u>al-Dāraqutnī, Sunan al-Dāraqutnī.</u>
Dari. =	<u>al-Dārimī, Sunan al-Dārimī.</u>
Daw.=	<u>Abū Dāwūd, Sunan Abī Dāwūd.</u>
EI =	<u>The Encyclopaedia of Islām.</u>
GAS =	<u>F. Sezgin, Geschichte des Arabischen Schrifttums.</u>
GQ	<u>T. Nöldeke and F. Schwally, Geschichte des Qorans 1-11.</u>
H.=	Ḥadīth.
Hak.=	<u>al-Ḥākim, al-Mustadrak 'alā al-Saḥīḥayn.</u>
Han. =	<u>Ibn Ḥanbal, al-Musnad.</u>
IC =	<u>Islamic Culture.</u>
IJMES =	<u>International journal of Middle East Studies.</u>
IQ =	<u>Islamic Quarterly.</u>
IS	<u>Islamic Studies.</u>
Jah.=	<u>Ibn Mājah, Sunan Ibn Mājah.</u>
JAOS =	<u>Journal of the American Oriental Society.</u>
JASB =	<u>Journal and proceedings of the Asiatic Society of Bengal.</u>
JCL =	<u>Journal of Comparative Law.</u>
JESHO =	<u>Journal of economics and social history of the Orient.</u>
JICL =	<u>Journal of Islamic and Comparative Law.</u>
JOS =	<u>Journal of the Oriental Studies.</u>

JRAS =	<u>Journal of the Royal Asiatic Society.</u>
JSS =	<u>Journal of Semitic Studies.</u>
K.=	<u>Kitāb.</u>
Le Muséon =	<u>Le Muséon Revue d'Études Orientales.</u>
MAIDC =	<u>Mémoires de l'Académie Internationale de Droit Compare.</u>
Ma.=	Mālik, <u>al-Muwatta'.</u>
Manar =	<u>Majallat al-Manār.</u>
Mu. =	Muslim, <u>Ṣaḥīḥ Muslim.</u>
MW =	<u>The Muslim World.</u>
Na.=	Nasā'ī, <u>Sunan al-Nasā'ī.</u>
NT.=	New Testament.
OLP =	<u>Orientalia Loranensia Periodica.</u>
Orita =	<u>Ibadan journal of Religious Studies.</u>
OT.=	Old Testament.
Q.=	The <u>Qur'ān.</u>
QS,=	J.Wansbrough, <u>Quranic Studies.</u>
Ris.=	al-Shāfi'ī, <u>al-Risāla.</u>
SALP =	N. Abbott, <u>Studies in Arabic Literary Papyri.</u>
San.=	al-San ani, <u>al-Muṣannaf.</u>
SCR =	<u>Studies in Comparative Religion.</u>
Shaw.=	al-Shawkānī, <u>Nayl al-Awtār.</u>
SI =	<u>Studies in Islam.</u>
SM,=	J.Wansbrough, <u>The Sectarian Milieu.</u>
SO =	<u>Studia Orientalia.</u>
SP.=	Stoning Penalty.
S.Ica.=	<u>Studia Islamica.</u>
SV =	Stoning Verse.
TGUOS =	<u>Transactions of the Glasgow University Oriental Society.</u>
Tab.=	Ṭabarānī, <u>al-Mu'jam</u> ( S= al-Ṣaghīr, K = al-Kabīr A = al-Awsaṭ)
Tahdhib.=	Ibn Ḥajar, <u>Tahdhīb al-Tahdhīb.</u>
Tay.=	Ṭayālīsī, <u>Musnad Abī Dāwūd al-Ṭayālīsī.</u>
Tir. =	Tirmidhī, <u>Jāmi' al-Tirmidhī.</u>
Umm.=	al-Shāfi'ī, <u>Kitāb al-Umm.</u>
WI =	<u>Die Welt des Islams.</u>



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## NOTES TO THE INTRODUCTION

1. The word has been used here not as antithesis to "written", but rather as a convenient expression for ḥadīth material as opposed to the Qur'ān. For Oral v. Written transmission/narration of the ḥadīth, see Goldziher: Muslim Studies, vol.2, p.181ff. cf. p.21ff; N. Abbott, SALP vol.2, Qur'anic Commentary and Tradition, pp. 64-83; J. Wansbrough, SM, p.80. But cf. F. Rahman, Islām, p.53ff; M.A. al-Khaṭīb, al-Sunna wa Makānatuhā fī al-Tashrīf<sup>c</sup> al-Islāmī, pp.69-86; M.M. Azami, Studies in Early Ḥadīth Literature, pp. 1-207.
2. For the antethesis of these terms and their historical evolutions see Goldziher, op.cit., vol.2, p.24f; J. Schacht, Origins, p.61f; N.J. Coulson, A History of Islamic Law, pp.36-52; cf. F. Rahman, op.cit., p.53ff; M.A. al-Khaṭīb, op.cit., pp. 59-61. But cf. El, second edition, s.v. "Ḥadīth" "Sunna". Important too are the usage of Shāfi<sup>c</sup>ī for Sunna, Hikma and Ḥadīth. See Risāla, nos. 96, 245-57, 305-7 but cf. nos. 1682-1804, 1807-1811 and 1254; and Yahyā b. Sallām, al-Taṣārīf, pp.201-202.
3. Cf. Goldziher, op.cit., pp.229ff, with particular reference to Abū Dāwūd and Tirmidhī; N.J. Coulson, op.cit., pp. 12ff. But cf. Rahman, op.cit., pp. 40-66; Shāfi<sup>c</sup>ī's statement concerning the Qur'ān, Ris. nos. 49-52; and Siddiqī, M. Zubayr, "The importance of Ḥadīth as a source of Islamic Law", Studies in Islam, I (1964),

pp. 19-25; but cf. Schacht, "Sur l'expression "Sunna du Prophet". Melanges H. Masse, 1963, pp. 361-365.

4. This is the most widely accepted application of the term "ḥadīth". Other technical terms are "khabar" (pl. akhbār) and (pl. āthār). However, it is not uncommon to find ḥadīth being used solely for Prophetical ḥadīth while khabar and athar being used for non-prophetical ḥadīth. Further refinements are: khabar for reports in general, hence will include ḥadīth, and āthār for sayings of the Companions and their Successors onwards. Thus, athar is a well known saying of anybody other than the Prophet. See Goldziher, Introduction to Islamic Theology and Law, pp. 37f; and El, second edition, s.v., "Ḥadīth".

5. The importance of the isnād as the criterion for the authentication of the ḥadīth can be seen from statements such as:

Isnād is part of the Religion; had it not been for the isnād, people would have said what they had wished to say.

and:

Between us and the rest (i.e. others) are the pillars (i.e. the isnād. In other words, "The isnād is our yardstick).

Both sayings are ascribed to 'Abd Allāh b. Mubārak (d.181). See Nawawi's commentary on the Ṣaḥīḥ Muslim (Sharḥ al-Nawawī), vol.1, pp. 87 and 88. Awza<sup>c</sup>ī (d.157) is reported to have said:

"Isnād is the weapon of the Believer. In the lacking of it, how can he fight?"

Baghdādī, Sharaf Aṣḥāb al-Ḥadīth, Dār al-Kutub, MS Ḥadīth B. 23737, fol. 80; see also Jah. Muqaddima: C.9, H.10.

But cf. another statement ascribed to Ibn Sīrīn (Baṣran, d.110) which says:

They never used to ask about the isnād until after the Fitna (civil war), when they started to say: "Give us the names of your authority". Thus they would check if the transmitters were among the ahl al-Sunna, their ḥadīth would be accepted. But if they were found to belong to the innovators, their ḥadīth would be rejected.

Sharḥ al-Nawawī, op.cit., p.84; Dārimī, al-Sunna, vol.1, p.112; al-Rāmahurmuzī, : al-Muḥaddith al-Fāṣil Bayn al-Rāwī wal-Wāḥid, Koprulu (Sezgin 1, 193) MS No. 397, fol.10 a. Cf. Goldziher, op.cit., pp.140 ff; Robson, J. "The Isnād in Muslim Traditions", Glasgow Univ. Or. Soc. Trans., vol.15 (1953), pp.15-26; and "Standards applied by Muslim Traditionists", Bull. John Rylands Lib, 43 (1961), pp. 459-479; and Schacht, Origins, pp. 36 ff. cf. n.1, p.37.

6. A typical example is the application of certain technical terms, primarily designed to be applied exclusively to the isnād, but for specific reasons they

could also be extended to the text of the ḥadīth. For instance, muḍṭarab, that is unsettled, muddled or disarrayed, is defined, with reference to the maṭn = the text, as a category of two contradicting ḥadīths transmitted by two people of the same standards of trustworthiness. Several recommendations are given as how to solve the problem. Among them is to seek another ḥadīth supporting either or to harmonize the conflict. See Schacht, Origins, pp. 37-38 and n.1, p.38; Azami, A. Studies in Ḥadīth Methodology and Literature, pp.66-67; cf. Goldziher, op.cit., pp. 85-87 and p.141; but cf. Siba i, op.cit., pp.249 ff. See also EI, second edition, s.v. "Ḥadīth".

7. But cf. Azami, A. Studies in Early Ḥadīth Literature, pp. 210-268; and Rahman, op.cit., pp. 63-67.
8. Goldziher is the pioneer and his work is still fundamental for ḥadīth criticism. His arguments were soon echoed by a number of Orientalists as well as some Muslim scholars. To mention but few for the latter: Aḥmad Amīn, Fajr al-Islām, pp. 255-74; Abū Rayya, Adwā' alā al-Sunnat al-Muḥammadiyya, pp. 285 ff.; Ismā'īl Ad-ham, Tārīkh al-Sunna (out of print), published in Cairo, 1353 A.H. but was banned after the intervention of Al-azhar to that end, and Ali Hasan <sup>c</sup>Abd al-Qāidr, Nazrat ḥamma fī Tārīkh al-Fiqh al-Islāmī, pp. 126 ff. See also the article: "al-Islām huwa al-Qur'ān wahdahū", al-Manār, vol.9, issues 7 and 12, by Tawfīq Ṣidqī.



Cf. <sup>c</sup>Abd al-Ḥusayn Sharaf al-Dīn, Abū Huraira,; 2nd  
 Abū Rayya, al-Shaikh al-Madīra Abū Huraira, pp.  
 For opposite views see Abdurrahmān b. Yahyā al-Yamānī,  
al-Anwār al-Kāshifa limā fī Kitāb -- Adwā' <sup>c</sup>alā  
al-Sunnat -- minal-ḍalāl wal-tadlīl wal-mujāzafa,  
 pp. 10 ff; Abdulrrazāq Ḥamza, Ẓulumāt Abī Rayya,  
 pp. 15 ff; Bahnasāwī, S. al-Sunnat al-Muftarā <sup>c</sup>alayhā,  
 pp. 000; al-Khaṭīb, M.A. op.cit., pp. 249-55, 375-81,  
 and 502 ff.; Sibā<sup>c</sup>ī, M. op.cit., pp. 212-418.

9. See Goldziher, op.cit., p. 148 and n.3.
10. Ibid., p. 143 f.; Ibn Khaldūn, al-Muqaddima, p. 261 f.;  
 cf. Subkī, Qā'idat al-Jarḥ wal-Ta<sup>c</sup>dīl, pp. 8-82.
11. Goldziher, op.cit., pp. 140-44.
12. Wansbrough, J., QS. p. 140 and n.3.
13. See Schacht, Origins, pp. 37 f., and 45 particularly  
 n.2.
14. Goldziher declared: "It is hardly possible to sift,  
 with any confidence, from the vast material of the  
ḥadīth, a portion that may genuinely be referred either  
 to the Prophet or to the early generation of his  
 Companions and the ḥadīth is to be regarded rather as  
 a record of the views and attitudes of early generations  
 of Muslims than of the life and teaching of the Prophet

or even of his Companions". See Schacht, Origins, p.4, n.3. But cf. Goldziher, Muhammedanische Studien, vol.2 (1890) p.5; and Introduction to Islamic Theology and Law, pp. 38 f. Schacht's expanded conclusion is that the legal ḥadīth owes its origin to the late Umayyad administrative and popular practice. See Origins, p.4 and 138.

15. "Every legal tradition from the Prophet, until the contrary is proved, must be taken not as an authentic or essentially authentic, even if slightly obscured, statement valid for his time or the time of the Companions, but as the fictitious expression of a legal doctrine formulated at a later date" Ibid. p.140. In my opinion, this statement has neither been proved by Schacht himself nor by anyone else, yet. I totally agree with Coulson in this respect: See A History of Islamic Law, pp. 69-70. Similarly, Schacht's conclusion concerning dogmatic traditions, based on the so-called dogmatic treatise of Hasan al-Baṣrī (d.110), is subject to the same reservation. See Origins p.74 and 141. Cf. Rahman, F.: Islam, pp. 44 ff. Yet, the authenticity of the treatise itself is a subject of controversy. See Wansbrough: QS, pp. 160 ff.
16. A good case at hand is "the case of the six slaves", presented convincingly, in my opinion, by Coulson. See A History of Islamic Law, pp. 65 ff.

17. A sounder example is the conclusion of Burton, who after extensive study of the ḥadīth material dealing with the Naskh - abrogation - and variant Readings - qirā'āt - proposed that ḥadīths from a younger Companion are later than ḥadīths from an older Companion, while the Qur'ān "reading" of a younger Companion is later than the Qur'an "reading" of an older Companion. Similarly, for conflicting traditions from the Prophet, those whose isnāds are traced through the younger Companions are later than, and were intended to supersede, those reported from the older Companions: al-Nāsikh wa al-Mansūkh, p. 468, Ph D Thesis, 1970, School of Oriental and African Studies, University of London; Cf. Wansbrough, QS. pp. 195-202.
18. Rahman puts it better: "...an extensive and systematic comparison of legal traditions in their historical sequence is unassailably scientific and sound in method...but it is equally important that the method be used carefully and that we must be quite clear as to what precisely it can accomplish, prove or disprove ...On the whole, a healthy caution rather than outright scepticism is likely to lead to reliable and constructive results". See, Islam, pp. 47-49.
19. See Burton: CQ. pp. 68-113; Wansbrough, QS, pp. 70 f., 193-98, and SM, p. 79 f.
20. This is not to suggest that these laws have never been

employed outside, or even before, Islām, rather that they came to be known as the Islamic punishment for adultery. See Arkoun, M. "The death penalty and torture in Islamic thought" Concilium, 120 (1978), pp. 75-82.

21. The word here has been used in its wider sense and not as a reference only to the Sunnis. Nevertheless, the ḥadīth material to be analysed is that of Sunni traditionists. No reference will be made to Shī<sup>c</sup>a and Ibādī ḥadīth nor their juridical points of view unless there is a fundamental or significant disagreement with the Sunnis both in terms of ḥadīth material and juridical disputes. Thus it is more appropriate to mention the Shī<sup>c</sup>a and Ibādī in the footnotes than in the main body of the thesis. This is so, because strictly speaking the Shī<sup>c</sup>a and Ibādī sources belong to the Post Classical period, that is fourth century A.H. onwards, while my concern is the ḥadīth material of the second and third century A.H. together with the juridical disputes prior to and including the Classical period.

22. Conventionally, this term is used for the period from the beginning of the second century A.H. onwards.

23. Schacht, Origins, pp. 56, 77 and 134. cf. pp. 59, 79 93, 97 and 122.

24. Pioneers too were Abū Dāwūd Sulaimān b. al-Jārūd al-Ṭayalisi (d. 204) who composed his Musnad, and Abd al-Razzaq al-Ṣan<sup>c</sup>ānī (d. 211) whose work, al-Muṣannaf, is more appropriately classified as a

corpus-juris than as a ḥadīth corpus.

25. Important ḥadīth works for this period are:

Ṣaḥīḥ Ibn Khuzaima (d.311)

Musnad Abī Ḥawāna (d.316)

Ṣaḥīḥ Ibn Hibbān (d.354)

Muḥjam al-Ṭabarānī (d.360)

Sunan al-Dāraquṭnī (d.380)

Mustadrak al-Ḥākim (d.405)

Musnad Abī Nuʿaim (d.430)

al-Sunan al-Kubrā lil-Baihaqī (d.458)

and Maṣābiḥ al-Sunna of Baghawī (d.ca.510)

26. See EI s.v. "Sunna" cf. Wansbrough, QS, p. and SM, p.  
cf. F. Schuon, "Remark: on the Sunnah" SCR, 6 (1972)  
pp. 194-199, and Fazlu Rahman, "Sunnah and Ḥadīth" IS., i  
ii (1962), pp. 1-36.

27. See EI., s.v. "Ikhtilāf", cf. Ris. nos. 1671-1680 and  
1682-1840, also Umm, vol. pp. 254-277; Goldziher,  
Introduction to Islamic Theology and Law, pp. 47 ff., and  
Origins, pp. 288-328.

28. al-Jāmiʿ al-Ṣaḥīḥ al-musnad min Rasūl Allāh Salla Allāh  
ʿalayhi wa Sallam. See Goldziher, Muslim Studies, II,  
pp. 216-26; and vol.1, p.125; cf. W.R. Taylor, "Al-Bukhārī  
and the Aggada", MW 33 (1943), pp. 191-202.

29. Jāmiʿ al-Ṣaḥīḥ al-Tirmidhī. Goldziher, op.cit., pp.229 ff.

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cf. J. Robson, "The transmission of Tirmidhi's Jāmi<sup>c</sup>"  
BSOAS 16 (1954), pp. 258-270.

30. al-Muwatta' li al-Imām Mālik b. Anas. See Goldziher,  
op.cit., pp. 197-209; and EI, s.v. "Bukhārī", "Tirmidhi"  
and "Mālik"
31. Exaltation of this kind has also been granted to the  
Muwatta', the Jami<sup>c</sup> al-Sahīh of Muslim (d. 261) and  
sometimes to both Muslim and Bukhārī. See Ibn Hajar  
al-Asqalānī (d. 852). Hady al-Sārī muqadidimat Fath  
al-Bārī, pp. 21-22.
32. But cf. Goldziher, op.cit., pp. 240-241.
33. This is particularly obvious from his method of class-  
ifying a ḥadīth with comments such as : Sahīh gharīb,  
Gharīb, Hasan Gharīb min hādha al-wajh, etc. See the  
Jāmi<sup>c</sup>. Cf. Goldziher, ibid., pp. 232 and n.2; and  
J. Robson, "Varieties of hasan tradition" JSS., 6 (1961)  
pp. 47-61; cf. "Tradition: investigation and classification"  
MW., 41 (1951), pp. 98-112.
34. Usually preceded by: "Qāla Abū<sup>c</sup> Isa ...." see Goldziher,  
op.cit., p. 232 f.
35. We will have occasionally an opportunity to mention  
some other versions which are in existence, the best  
known is the version of Shaybānī (d.189) -

Muwatta' al-Imām -; Cf. Schacht: "Deux Editions Inconnues du Muwatta'." S.O. Roma, 1956 vol. II, pp. 477-492. I am very grateful to Ms. P. Boutelier for translating the entire article into English.

36. It is here precisely that the isnād might be a useful instrument for dating the ḥadīth in question. Cf. Origins, pp. 163-76; J. Robson, "The isnād in Muslim Tradition" Glasgow Univ.<sup>1</sup> Soc. Trans. 15 (1953-54), pp. 15-26.

37. Cf. Abbott., SALP, II, p. 1-2.

38. The main scholars to be considered here are:

Ibn Abī Laylā - Kūfian - (d. 148)

Abū Hanīfa - Kūfian - (d.150)

Mālik - Medinian - (d.179)

Abū Yūsuf - Kūfian - (d.189)

Shaybānī - Kūfian - (d.189)

Shāfi'ī - Medinian/Egyptian - (d. 204) and

Ḥanbal - Baghdādian - (d. 241)

Of secondary consideration are:

Ibn Musayyib - Medinian - (d. 93/94)

Nakha<sup>c</sup>ī - Kūfian - (d. 95-98)

Sha<sup>c</sup>bī - Kūfian - (d. 100)

Mujāhid - Meccan/Medinian - (d. 104)

Qāsim b. Muḥammad - Medinian - (d. 106)

Ṭawūs - Meccan - (d. 106)

Ḥasan al-Baṣrī - Baṣrian - (d. 110)

Ibn Sīrīn - Baṣrian - (d. 110)

Makhūl - Sirian - (d. 113)

ʿAtā' - Meccan - (d. 114)

Qatāda - Medinian - (d. 118)

Ḥammād b. Sulaimān - Kūfian - (d. 120)

Zuhrī - Medinian - (d. 124)

Rabīʿa b. ʿAbd Rahmān - Medinian - (d. 136)

Awzāʿī - Syrian - (d. 156)

Zufar - Kūfian - (d. 158)

Sufyān al-Thawrī - Kūfian - (d. 161)

39. The leading early scholars are:

Sahnūn - Mālikite - (d. 240)

Abū Thawr - Shāfiʿite - (d. 240)

Tahāwī - Ḥanafite - (d. 321) and

al-Kharqī - Ḥanbalite - (d. 334)

for more names see the Table at the end of Volume 2.

40. See: Early Rabbinic Judaism, Leiden 1975; Development of Legend, Leiden, 1970; The Modern Study of the Mishnah, Leiden, 1970; The Rabbinic Traditions about the Pharisees before 70, vol. I, Leiden, 1971; and From Politics to Piety, New Jersey, 1973.



## NOTES TO CHAPTER ONE

1. A Jew of Medina belonging to the Banu Qaynuqā<sup>c</sup> and originally was called al-Ḥuṣayn, but Muḥammad gave him the name of <sup>c</sup>Abd Allāh when he embraced Islām. There are contradicting accounts concerning when and where Ibn Salām embraced Islām. Among these is the account that he embraced Islām in the year 8 A.H. See Ibn Ḥajar, al-Isāba, vol. 2, p. 780 ff. Ibn Salām's name in the ḥadīth literature has become the typical representative of a group of Jewish scribes which honored the true prophethood of Muḥammad together with his message and hence protecting him from the intrigues of the faithless castodians of the Torah. See Ibn Hishām, the Sīra, vol. 1, pp. 516-18; Wāqidī, al-Maghāzī, ed. Welhausen, pp. 164, 215; Han. vol.3, pp. 108, 272; vol. 5, p.450; Bu. Anbiyā' : 1; cf. EI. second edition, s.v. "<sup>c</sup>Abd Allāh b. Salām".
2. See Wansbrough, QS, pp. 122-6, 194 and particularly p.198; SM, p. 40 ff., 90, passim.
3. See Burton, CQ, p. 69 ff. cf. Wansbrough, QS, pp. 70, 193-6 and 198.
4. See Wansbrough, ibid., p. 70; cf. also synopsis (A) below.
5. The position of Ibn Salām within the Jewish community of Medina is illustrated in a different tradition where

Muhammad, prior to his Call to the Jews, is reported to have asked them: "Who is Ibn Salām among you?" "He is our master, son of our master. Our rabbi and a well-versed man", they replied. See Ibn Hishām, op.cit., vol. 1, p. 517, 1.10; but cf. p. 557, 1.15. Cf. Bu. Manāqib al-Ansār: c.19; Mu. Fadā'il al-Ṣahāba: c.33, H. 1 - 4; Tir. Manāqib: c. 36.

6. Some versions, however, identify him as Ibn Ṣūriā and sometimes as al-a<sup>c</sup>war - the patched-eye -. ibid. vol. 1. p. 560; cf. Wansbrough, QS, p. 70.
7. Muhammad is reported to have said: "Let me be the first man to revive God's Injunction and His Book and to prectice it". Ibn Hishām, the Sīra, vol. 1, p. 566; cf. Wansbrough, QS, p. 71. Other versions make Muhammad saying: "I will be the first man to revive a practice which they had abandoned".

while others make him proclaiming: "I judge in accordance with that which is in the Torah". (fa anā aḥkum bimā fī al-Tawrāt) see Fath, vol.15, p. 186,

8. The fact that the Story of the JC was not reported by most of the Pr. F.P. jurists until well after the middle of the second century A.H., but nevertheless was recorded or claimed to have been recorded by Ibn Ishāq in his Sīra, suggests that the episode was primarily used by the biographers of the Maghāzī/Sīra, literature

for prophetic credentials, who got hold of it from the story-tellers. The latter, however, would appear to have composed it for entertainment.

9. Mālik employed this element to reject the doctrine of the Irāqīs who suggested tying up the culprit and putting him in a ditch before the SP so as to prevent him from running and hence to minimize the pain. See Mudawwana, vol. 16, p. 41.
10. See Tahdhīb, vol. 11, p. 221 ff; cf. Ibn Madīni's comment on Yahyā, ibid., p. 223, l.18; See n. 16 Chapter Two below.
11. s.v. "h-d-th" respectively.
12. One of the three Jewish tribes of Yathrib (Medina) related to Banū al-Naḍīr. See EI, 1st. ed. s.v. "Kuraiza".
13. Lisān, vol. 2, p. 131, column 2, L. 3; Ibn Hishām, however, relating on the authority of Ibn Ishāq, states that the unnamed culprit was killed because she threw a millstone on Khallād b. Suwayd and killed him. See the Sīra, vol. 2, p. 242.
14. The ḥadīth is reported by Ḥanī, vol. 1, pp. 81, 119, 122, passim; vol. 2, pp. 398, 417, passim; vol. 3, pp. 129, 183, passim; vol. 4, pp. 55, 56, passim; Bu. Madīna: 1;

Jizya: 10, 17; Farā'id: 21; I<sup>c</sup>tiṣām: 5, 6; Mu. Hajj: 463, 464, 467-70; Itq: 18-20; Daw. Manāsik: 95; Diyāt: 11, 26; Adab: 110; Tir. Walā' : 3; Nas. Qasāma: 9, 31; Jah. Hudūd: 36; Diyāt: 8; Waṣāyā: 6; Dāri. Farā'id: 2; Siyar: 83. Mālik, however, does not appear to have known the ḥadīth in question despite the fact that he transmits twenty one ḥadīths concerning the sanctity of Medina. See Muwatta', Kitāb al-Jāmai<sup>c</sup>; cf. Wansbrough, SM, p. 83-4.

15. Lisān, op.cit.; See also s.v. "bid<sup>c</sup>a" cf. EI, 2nd ed. s.v. "bid<sup>c</sup>a".
16. Fath, vol. 15, p. 140.
17. Ibn Hishām transmits the Story of the JC on the authority of Ibn Ishāq (d. 150/1) but in fragmentary manner. See the Sīra, vol. 1, pp. 564-66. A short version of the Story appears to have been known to both Ibn Abī Laylā (A Qāḍi at Kūfa, d. 148) and Abū Ḥanīfa (d. 150). See Abū Yūsuf, Ikhtilāf, p. 221, and Kharāj, p. 98.
18. See Lisān, s.v. "Balāṭ". Ibn Hajar provides several interpretations for the word in question and why Bukhārī employed the same word for his rubric. Among these are: a) It refers to a very well known place at the gate of Muḥammad's mosque in Medina; b) its a term used for any solid ground; c) it was a very well known area in Medina, between the Mosque and the Market; d) it is a

solid covered ground. As for the reason for Bukhārī's rubric: Bāb al-Rajm fil balāṭ, is to show that the JC could have not been stoned to death in a ditch. See Fath, vol. 15, p. 139.

19. See below Chapter Two, p.60 fn. 43-44, cf. p. 224 ff.
20. Muḥammad b. Uthmān al-<sup>C</sup>ijlī al-Kūfī, d. 254. This is the only place where his name occurs in Bukhārī. See Tahdhīb, vol. 9 entry 561, p. 338 f. The transmitter claims to have received his version from Khālīd b. Makhlad al-Kūfī, d. 213, who was branded as: "Yarwi al-manākīr" (relating unaccepted/unknown ḥadīths) See Tahdhīb, vol. 3, entry 221, p. 116 ff.; and al-Dhahabī, al-Mughnī, vol. 1, entry 1881, p. 206.
21. See Burton, "The Meaning of Iḥṣān", JSS, 19 (1974), pp. 47-75.
22. See Chapter Thirteen, below, p. 290 ff.
23. In this case, Bukhārī supports the opinion of Shafi<sup>C</sup> against that of Mālik and Abū Ḥanīfa. See Fath, vol. 15, p. 181; cf. Sharḥ al-<sup>C</sup>Aynī, vol. 24, p. 17 f.
24. The same version is employed again in cf. Goldziher, Intro. to Islamic Theology and Law, pp. 39 ff.

25. However, the marital status criterion, presented in the "thayyib v bikr" antithesis is earlier than the employment of the technical terms "muḥṣan v ghayr muḥṣan". See Chapter Three p. 51 below and Chapter Thirteen below, pp. 290 ff.
  
26. The suggestion of this name here is mind, based on the sequence of the account.
  
27. Cf. element -i- of Ma.A.1 - and its implication above.
  
28. See Ṭabarī, vol. 4, p. 1-6 commenting on Sūra 3:93; Qurtubī, vol. 4, p. 134 f. cf. Wāhidī, Asbāb al-Nuzūl, p. 84; cf. Abraham I. Katsh, Judaism in Islām, pp. 123-24, and n. 24, 25.
  
29. It is unlikely that Bukhārī, in transmitting this version under such a rubric, was concerned with the asbāb al-nuzūl. Besides, the verse in question has been claimed to have been revealed for a different reason. See Ṭabarī, Qurtubī and Wāhidī, op.cit.
  
30. We do not know which of the two incidents occurred first. However, the Story of the JC is claimed to have happened when Muḥammad arrived at Medina. See Ibn Hishām, the Sīra, vol. 1, pp. 516-18 but cf. Fath, vol. 15, p. 186 f.
  
31. Bu. Tawhīd; C. 51. The hudūd section precedes the Tawhīd.

32. This is presumably the kind of the ḥadīth upon which the early discussions between the Khawārij and the non-Khawārij (sunnis) were derived.
33. His rubric there runs as follows: Bāb ahkām ahl al-dhimma wa iḥṣānīhim idhā rufi<sup>ū</sup> ilal-Imām.
34. See Calder, "The Structure of Authority in Imami Shī<sup>ī</sup> Jurisprudence", Ph.D thesis, SOAS (1980) chapters 1 and 2. cf. Yaḥyā b. Sallām, al-Taṣārīf, pp. 148-9 and 150-53.
35. See Mukhtasar al-Muzanī, on the margin of Umm, vol. 5, pp. 167-8; Umm, vol. 6, p. 124.
36. See Ibn Hishām, op.cit., pp. 564-66. cf. Wansbrough, SM, p. 20.
37. See Tahdhīb, vol. 12, entry 1216, pp. 262-67; and Ibn Abdalbarr, al-Istī<sup>ā</sup>b, vol. 2, entry 375, pp. 697-8; cf. Diyā' al-Raḥman al-A<sup>z</sup>ami, M. Abū Huraira, pp. 51-79; For the legends around Abū Huraira, see Mu. Faḍā'il al-Ṣaḥāba: c. 35, H. 1-3; and Tir. Manāqib: c. 46.
38. See Tahdhīb, vol. 5, entry 474, pp. 276-79. Some of the early transmitters declared that Ibn <sup>ā</sup>Abbās had never received directly more than ten ḥadīths from the Prophet. Ibid., p. 279, L.12. At the death of the Prophet, he was 10 years old. See al-Istī<sup>ā</sup>b, vol.1,

entry 1591, p. 372 ff. cf. Bu. Faḍā'il aṣḥab al-Nabiy:  
c.24; Mu. Faḍā'il al-Ṣaḥāba: c. 20, H.1; Jah.  
Muqaddima: c.33; Tir. Manāqib: c.42.

39. Son of ʿUmar b. Khaṭṭāb, the Caliph. He is reported to have emigrated to Medina with his father at the age of c.9 (d.c. 73). See Tahdhīb, vol. 5, entry 565, p. 228 ff; cf. al-Iṣāba, vol. 1, entry 1579, pp. 368-70; Ziriklī, al-Aʿlām, vol. 4, p. 245; But cf. EI, 2nd ed. s.v. "Abd Allāh b. ʿUmar"; See also, Abū Yūsuf, Kharāj, p. 106; Han. vol. 2, p. 12, l.14; Bu. Kitāb Faḍā'il aṣḥab al-Nabiy: c. 19. Mu. Faḍā'il al-Ṣaḥāba: c. 31, H. 1-2; Tir. Manāqib, c. 43.

40. One can hardly miss the obvious picture and the situation from which Zuhri is reported to have received his Story. The unnamed man of Muzayna is definitely a story-teller. He himself claims to have received his account from a similar situation. Later, however, the story-teller of Zuhri was omitted and in his place some recognized and well established tradents were inserted. None of them, one should note, belongs to the Muzayna tribe. Ibn Ishāq, I would dare say, is probably the reconstructor of the episode. For the biography of Ibn Ishāq and the controversy concerning his credibility see Tahdhīb, vol. 9, entry 51, pp. 38-46.

41. Abū Huraira went to Medina and embraced Islām in the



year 7 A.H. See Tahdhīb, vol. 12, entry 1216, pp. 262-67; al-Iṣāba, vol. 4, entry 1176, pp. 381-99.

42. Note the juridical tendency behind these technical terms.
43. The predictable decision which was going to be offered by Ibn Ṣūria was first utilized by describing him as: "The only living soul who knew the Torah best." See Ibn Hishām, the Sīra, vol. 1, p. 565. In p. 514, he is described as the best scholar of the Torah in the Hijāz.
44. Note again the source and situation of the Story.
45. See his encounter with Muḥammad concerning the interpretation of the opening Letters of the Qur'ān and the revelation of Q.3:7, Ibn Hishām, the Sīra, vol. 1, p. 542 ff. cf. p. 548 for Q.2:109.
46. His name is included in a long list of the Medinan Jews who are identified as the enemies of Muḥammad in particular and of the Muslims in general. Ibid. pp. 513-16. Ibn Ḥajar, quoting Ṭabarī and Tha<sup>c</sup>labī on the authority of Ibn <sup>c</sup>Arabī, mentions few more names of those who went to Muḥammad in connection with the case of the JC. See Fath, vol. 15, p. 182. Jibrīl is mentioned as being the one who advised Muḥammad to consult Ibn Ṣūria. Ibid. I 11.

47. See also Ibn Hisham, the Sīra, vol. 1, p. 514.
48. Has he embraced Islām in the first place? See, Fath, vol. 15, pp. 183-3; cf. al-Isāba, vol. 2, entry 9132, pp. 794 f.
49. Q.4; 41-42. However, Qurṭubī provides three stories concerning the occasion of its revelation. These are: It was revealed after the dispute of blood money between Banū al-Naḍīr and Banū Quraiza; It was revealed with reference to Muḥammad's viceroy to the Jews, Abū Lubāba and It was revealed with reference to the Story of JC. Qurṭubī favours the last account. See Qurṭubī, vol. 6, pp. 176-82. Similar preference is shown by al-Wāḥidī, Asbāb al-Nuzūl, p. 145 f; cf. Ṭanṭāwī, M.S. Banū Isrā'īl filqur'ān wa'l sunna, vol. 1, pp. 277-82, cf. 282 ff.
50. I have no idea to whom this statement belongs. Ibn 'Abbās? Ibn Ishāq? or Ibn Hishām?
51. Note how far back to the antiquity the technical term has been pushed. cf. Fath, vol. 15, p. 184, 1.7 ff.
52. He emigrated to Medina after the conquest of Mecca. See Fath, vol. 15, p. 186; al-Isāba, vol. 2, entry 9149, pp. 803-813.
53. cf. n. 49 above, and Ṭanṭāwī, M.S., op.cit., p. 282.

54. See Wansbrough, QS, p. 193 f. for Abū'Ubaida's attitude, cf. SM, p. 20.
55. Or to borrow Wansbrough's expression, the literature belongs to the test of Prophethood. See QS, pp. 122-26, 146, 195 and 198.
56. ibid., pp. 122, 194; SM, p. 16 ff. cf. Ṭanṭāwī, M.S., op.cit., pp. 169-334.
57. See EI 2nd ed. under respective names and cf. "Hijra".
58. See Wensinck, The Concordance s.v. respective names. However, the identity of Wahb b. Yahūda still remains obscure. I could not find any reference about him other than that of Ibn Hishām.
59. See synopsis (A) below, pp. 37-44.
60. It is worth noting here that there is no transmitter of Muzaina or Banu Quraiza's clan in later isnāds. The only transmitter who is claimed to belong to a jewish tribe is Ibn Salām. But he belongs to Banu Qaynuqā<sup>c</sup>. See al-Isāba, vol. 2, entry 9093, pp. 780-82.
61. See Tahdhīb, vol. 10, entry 482, pp. 269-71.

## NOTES TO CHAPTER 2

1. This is the Mālikites' interpretation. Implied therein, is that the culprit was fully aware of the penalty. Muḥammad, however, wanted him to repent as Abū Bakr and 'Umar did. The Ḥanafites and their supporters did not accept this interpretation. Thus, element -a- of Mālik's pericope was edited out completely and a new element, in the form of addendum, underlying Mā'iz's ignorance of the consequence, i.e. the SP, was introduced. See Daw. C.24. H.4419-20, p. cf. Han. vol. 5, p. 217, l.10.
2. Apparently, there is no single hadīth work which does not include, in one form or another, the pericope of Mā'iz. Similarly, any discussion about the SP for adultery in the fiqh works would be substantiated by a version of the legendary Mā'iz. See Risāla, nos. 382; Umm, vol. 6, pp. 11, 119-21, passim; vol. 7, pp. 51, 114, 169, passim; Abū Yusuf, Kharāj, p.98 ; Āthār, H. 719; Mukhtasar al-Muzanī, on the margin of the Umm, vol. 5, pp. 166-68.
3. Han. vol. 1, p. 328; vol. 5, p. 348 ff; passim; Ṣan. vol. 7, H. 13333 - 42, pp. 319-23; Bu. Hudūd: 21, 22, 25, 29; Aḥkām: 19, 45; Mu. Hudūd: 16, 17, 19; Li'ān: 19, 15; Daw. Talāq: 27, Hudūd: 23; Tir. Hudūd: 4, 5; Nas. Janā'iz: 63; Talāq: 38, 41; Dār. Nikāh: 39; Dāraq. Hudūd: vol. 2, H. 39, 132, 146; Hāk. Hudūd: H. 53, passim; Bay. Hudūd: C.3; Bagh. Hudūd: 3.

4. Mālik's version is unanimously agreed to be mursal, that is a report which has been ascribed to a Successor - Tābi<sup>c</sup>ī. See EI, second edition, s.v. Ḥadīth.
  
5. The first Caliph of the Muslim community 11-13 A.H., d.13. See Tārikh Tabarī, vol. 1, pp. 1165-7; Ibn Sa<sup>c</sup>d, Ṭabaqāt, vol. 3, p. 121; EI. s.v. Abū Bakr.
  
6. Ibn Khaṭṭāb, the second Caliph, assassinated by the Lu'lu' in Medina. See al-Isāba, entry 5738 and Ziriklī, al-A<sup>c</sup>lām, vol. 5, p. 203 f.
  
7. In fact no one among the Classical authors has transmitted this element as part of the pericope. But cf. Fath, vol. 15, p. 133, l.9, where Ibn Ḥajar claims that Nasā'ī has transmitted a version of Mā<sup>c</sup>iz pericope with the element -a-. I could not find such a reference in the Sunan of Nasā'ī. Yes, a post-Classical traditionist, Bayhaqī, does transmit Mālik's version verbatim both the matn and the isnād. See Bay. Ḥudūd: C. 16, H. 8. Bayhaqī, ought to be noted, is a staunch Shāfi<sup>c</sup>ite, d.458. See EI., second edition, s.v. "al-Bayhaqī, Abū Bakr b. Al-Ḥusayn".
  
8. Mālik or his immediate transmitter, Yaḥyā b. Sa<sup>c</sup>īd (d.143), is more likely responsible for its incorporation in the pericope. See n. 16 below.

9. But Abū Dāwūd transmits a version in which Jābir b. <sup>c</sup>Abdullā is made to have said: "I was among those who had stoned the man. I am the only one who knows best about this incident(!) When we stoned him and he found the stones hurting him he shouted: 'O my people! Take me back to the Prophet; for my folks have cheated me. They told me that the Prophet will never kill me! But we went on stoning him until we finished him off.... .'" Daw. Hudūd: C. 24, H. 4419-20. cf. Han. vol. 5, p. 217, l.10.
10. The question that once a case of a hadd punishment was brought up to the executor of the law ("Imām" "ḥākim" and some times "Sultān"), the judge will have no choice but to apply the hadd punishment, was put to the mouth of the Prophet in a number of ḥadīths. See Daw. Hudūd: C.6.; Nas. Sariqa: C.5; Dār. Hudūd: C.5, 18; cf. Bu. Hudūd: C.12 (Muḥaribūn: C.25); Nas. Bay<sup>c</sup>a: C.9; Ma. Hudūd: 29; Bay. Ashriba: vol. 8, p.333; and Haithami, Majma<sup>c</sup> al-Zawā'id, vol. 6, p. 258 f. See also Khawārmī, vol. 2, p. 185. The recension of Yahyā b. Bukair, transmitted by Ibn Tūmart (d. 525) provides a special rubric for the story of Mā'iz. It runs as follows: Bābun fi al-hadd idhā balagh al-Imām. Muwaṭṭa' Ibn Tūmart, Ms. Rabāt, No. 122J, fol. 97. See Schacht, "Deux Editions Inconnues du Muwaṭṭa' " pp.477-492. For Ibn Tūmart, see al-Marākishī, al-Mu<sup>c</sup>jab, pp. 260 ff., and El, second edition s.v. Ibn Tūmart.

11. See "...liannahā waqī at hal". Fath, vol. 15, p. 148,  
 1.16 cf. Umm. vol. 6, p. 120 and Ibn Ḥazm, al-Muḥallā,  
 vol. 11, pp. 178-80. Ibn ʿArabi alleges that Abū Huraira  
 had expressed similar view with reference to Muḥammad's  
 desire that the man should go away and repent.  
al-Masālik, Ms. Fez, No. 180, fols. 216 and 217; also  
 al-ʿAbbās al-Sudrātī, Taqrīb al-Masālik, Ms. Royal  
 Archives, Rabāt, No. 1663, vol. 2, fol. 179.
  
12. See Abū Yūsuf, Ikhtilāf, p. 226; Kharāj, p. 194; Shaybānī,  
Muwattaʾ al-Imām, p. 245 ; cf. Umm. vol. 7, p. 169-70,  
 1.34; Sarakhsī, al-Mabsūt, vol. 9, p. 92 f.
  
13. See below Chap. 10. Iqrār.
  
14. See Abu Yusuf, Āthār, H. 7.9; Kharāj, p. 194; and  
Ikhtilāf, p. 226.
  
15. cf. Malik, Hūdud: C.1. (for shaikh and shaikha) Bukhārī,  
Bu. Hūdud: C.27, H.2. (for lakaza and wakaza).
  
16. A qādī at Medina during the last years of the Umayyads'  
 rule. Ibn Madīnī is reported to have said: "Yaḥyā's  
hadīths from Ibn Musayyib are false ascription".  
(la yaṣihh lahu ʿan Saʿid b. Musayyib ʿan Abī Huraira).  
Tahdhīb, vol. 11, entry: 360, p. 221 ff. particularly  
 L.18, p. 223.
  
17. See QS. p. 193; cf. Burton, The Meanings of Iḥsān,  
 JSS (1975), pp. 47-75.

18. See below Chap. 13. Rajm.
  
19. See Q.4:25; 5:5; 24:4 and 23. cf. Q 21.80 and 91; 12:48.
  
20. For instance, Ibn Ḥajar interpretes the sentence which reads: fa-hal aḥṣanta? as : ay tazawwajta? And then adds: "Hādha ma<sup>c</sup>nāhu jazman hunā liḥtirāq al-ḥukm fī man tazawwaja wa man lam yatazawwaj". Fath, vol. 15, p. 134, 1.14.
  
21. See Q.24:4; cf. Wansbrough, QS, p. 193 f; and Burton, CQ, pp. 72 ff.
  
22. See below Chap. 13, Rajm.
  
23. This is among the early disputed juridical matters on whether or not a mosque can be used for the application of the ḥudūd. See Abū Yūsuf, Ikhtilāf, pp. 222-224; Umm., vol. 7, p. 150, 1.20; Mudawwana, vol. 16, p. 16, 1.12. But cf. Ibn Ḥazm Muḥallā, vol. 11, topic 2165, p. 123. See also Schacht, Origins, p. 162.
  
24. He is the sole common link for all versions of the Story of Mā<sup>c</sup>iz. For the biography of Zuhri, see Tahdhīb, vol. 9, entry 732, pp. 445-51. cr. Schacht, Origins, pp. 176, 246.
  
25. His name became a "trade mark" for a sound isnād and hence authentic ḥadīth. *ibid.*, pp. 175, 246; cf. p. 163; cf. Goldziher, Muslim Studies, vol. 2, pp. 44-8, *passim*.



Abū Rayya, Adwā' alā al-Sunnat al-Muhammadiyah p.261 f. passim.

26. The earliest report about the adversaries of the SP occurs in the Umm, col. 7, p. 15, l.27, where they are identified as the Khawārij and some Mu<sup>c</sup>tazila. Ibn Qutaiba does the same, but like Shāfi<sup>c</sup>ī, he does not provide any detail concerning the actual arguments of the anti-SP. See Ta'wīl, p. 192, cf. p. 310. In fact all reports concerning the anti-SP party are those of the Sunni sources. Nevertheless, the anti-SP attitude continued in isolated cases by several individuals such as Kamāl b. al-Humām (a Ḥanafite scholar, d. 891) and more recently, Muḥammad Abū Zuhra and Mustafā al-Zarqā. See Ali Maṣṣūr, Niẓām al-Tajrīm wal-<sup>c</sup>Iqāb fi al-Islām, vol. 1, pp. 179-184.
27. Yūnus b. Yazīd al-Aylī, Egyptian, d. 159. See Tahdhīb, vol. 11, entry: 769, p. 450 f. Ibn Ḥanbal is reputed to have said: Some of his reports from Zuhri contain unaccepted points (munkarāt). ibid., p. 451, l.3.
28. Jabir is among those very few Companions to whom a large number of the hadīth material has been ascribed. Others are: Abū Huraira, Ibn <sup>c</sup>Umar, Ibn <sup>c</sup>Abbās and <sup>c</sup>Āisha. See Abū Rayya, op.cit., pp. 194-222; and Shaikh al-Madīra Abū Huraira, by the same author, Cairo, third edition, 1969. But cf. Sibā<sup>c</sup>ī, al-Sunna wa makānatuhā fī al-Tashrī<sup>c</sup> al-Islāmī, pp.273-305 and al-<sup>c</sup>Izzī, Difā<sup>c</sup> an Abī Huraira, pp. 95 ff.

29. Irāqī tradent, see Tahdhīb, vol. 9, entry: 759, p. 468 f.
30. This, ought to be noted, is the Sunnis' reply to the anti-SP party. See Ta'wīl, op.cit., p. 192 f.
31. For the variant reading of this term together with their implications see below Chap. 13 Rajm.
32. cf. n. 10 above.
33. The former belongs to the question of using a mosque for applying the ḥadd punishment and the latter belongs to a juridical dispute among the pre-Formative Period scholars on whether or not a condemned culprit should be tied up before being stoned to death. See Mudawwana, vol. 16, p. 41, l.8. But cf. Mu.C.11.A -9- Chap. 4 below. Ibn Ḥanbal, however, transmits a version which inforces this interpretation: "...we took him to Baqī<sup>C</sup>. By God, we never dug a ditch for him nor did we tie him up. He simply stood up for us and we stoned him to death". Han. vol. 3, pp. 61-2, l.31.
34. See also my analyses of the ḥadith C and D below.
35. cf. Bukhārī's rubric below for Bu.B.VIII. cf. Schacht, Origins, p. 162, and cf. pp. 209, 286 and 298.
36. Māliks contemporary but never met him. See Tahdhīb, vol. 8, entry 832, p. 459 ff., Ibn Sa<sup>C</sup>d is reported to

have said: Layth used to exercise fatwā. ibid. p. 461, L. 6. Shāfi<sup>C</sup>ī, who met both Mālik and Layth, is reported to have said: "Layth is more well learned than Mālik but he was unlucky; his deciples never spread his "gospel" (al-Layth afqah min Mālik illā anna aṣḥabahu lam yaqūmu bihi) ibid. p. 463, L.14 and 16.

37. Their practical consideration probably arises from the view point that the ḥadd is an end in itself. Hence once the ḥadd had served its purpose everything should return to normality. See Ibn Ḥazm, al-Iḥkām fi Uṣūli al-Aḥkām, vol. 2, p. 1141 (wa qālū inna<sup>C</sup> illat al-ḥudūd al-zajr wa al-rad<sup>C</sup>...)
38. Mālik adds:...Furthermore, I know of no one, among those with the Ḥudūd authority, who have performed the funeral prayer for the punished culprits. Mudawwana, vol. 16, p.41.
39. Irāqi tradent, d.230, see Tahdhīb, vol. 10, entry 109, pp. 64-5.
40. The author of the Muṣannaf, a shī<sup>C</sup>ī transmitting Sunni material, d. 210-11, ibid., vol. 6, entry 608, pp. 310-15.
41. Baṣran tradent, d. 154. ibid. vol. 10., entry 439, pp. 243 ff.
42. Vol. 7, H. 13337, p. 320.

43. But cf. Tir. B.I. -f- below.

44. See Fath, vol. 15, p. 140, L. 21, cf. vol. 16, p.278, L. 17.

45. This is another theological interpretation by which certain human features such as eyes, ears, noses, etc., understood to commit "adultery". Consequently, Muhammad was reported to have said:

العَيْنانُ نَزِيَّانُ وَالْيَدَانُ نَزِيَّانُ وَالرِّجْلَانُ نَزِيَّانُ وَالْفَرْجُ يَزْنِي

Han.vol. 1, p. 412; vol. 2, pp. 343, 344, 372, 411, 528, 535, 536. cf. Tir. Adab: 35; Nas. Zinā, 35; See Fath, vol. 15, p. 147, L. 17.

46. This is a single confession. See Fath, vol. 15, p. 147 f.

47. The tone itself shows that this was a matter of dispute between the jurists.

48. See Ma. Hudūd: C.2. H.2.

49. However, Abū Ḥanīfa accepts voluntary retraction. see Sarakhsī, al-Mabsūt, vol. 9, p. 96 f.

50. See Tahdhīb, vol. 6, entry: 12, p. 9 f.

51. One version is going back to Jābir and the second one to Abū Haraira through Ibn Musayyib. In both versions, however, Zuhri is the common link.

52. This version goes back to Abū Huraira through Abū Salama and Ibn Musayyib. Their common link is again Zuhrī.
53. See Tahdhīb., vol. 1, entry 657, p. 361 f.
54. Ibid. vol. 6, entry 140. p. 71 ff.
55. Ibid., vol. 2, entry 768, p. 441 ff.
56. See Fath, vol. 16, pp. 278-9.
57. Ibn Hanbal, however, knows a version in which the incident is reported to have happened at a place between Mecca and Medina. Han. vol. 4, p. 61, L. 30, cf. ibid., p. 66, L.17, vol. 5, p. 374, L. 7, and pp. 378-9, .27.
58. See "Muḥammad b. al-<sup>c</sup>Alā' al-Kūfī", Tadhkirat al-Huffāz, vol. 2, entry: 94, p. 73, but cf. Tahdhīb, vol. 9, entry 634, pp. 385-6.
59. See, Schacht, The Origins, pp. 163, 175 and 244-6.
60. Whether or not Yahya's version is the basis of the Irāqis' early version (cf. Kharāj, p. 00) is not clear, but, equally, it is not impossible. See Āthār, transmitted by Yūsuf (d. 192) son of Abū Yūsuf (d. 182), H. 719, p. 157. cf. the so-called: Masānīd Abī Hanīfa, composed by Khuwārazmī (d. 665) vol. 2, 194-5.

61. Little is known about Alqama. He is reported to have died in Kūfa towards the end of Khālīd al-Qasrī's governorship. See Tahdhib, vol. 8, entry 485, pp. 278-9.
62. d.63 during the reign of Yazīd b. Mu<sup>c</sup>āwīya. ibid. vol. 1, entry 797, pp. 432 f.
63. See Umm, vol. 7, pp. 139, passim.

### NOTES TO CHAPTER 3

1. But the tradent, Ibn Abī Mulayka, could not be the eye witness of the incident. He was the Qāḍi of Ibn Zubair in Mecca, see Dhahabī, al-Kāshif, vol. 1, entry 63/1678, p. 326. d.117; Tahdhib, vol. 5, entry: 523, p. 306 f.; Ibn Abdalbarr points out that other transmitters of the Muwattā', such as Qa<sup>c</sup>nabī, Ibn al-Qāsim, Muṭraf and Ibn Bukayr, ascribe the Ḥadīth to the son of Ibn Abī Mulayka. In other words, Yaḥyā b. Yaḥyā (the transmitter of the vulgate) pushes the Ḥadīth to Ibn Abī Mulayka - a Successor - while other transmitters of Mālik ascribe the Ḥadīth to a Successor of a Successor (Tābi<sup>c</sup> al-tābi<sup>c</sup>i). al-Istidhkār, Ms. Dār Kutub Cairo, No. 24, Ḥadīth, fol. 2462. L.9; See also Muwattā', Dār al-Sha<sup>c</sup>b publication, n.d., p.513, n.5. cf. Mu.C.1.B. a- below - which reads "O Prophet of God, purify me". The juridical distinction between Ma.C.I. a- and Mu.C.1.B. a- is that the statement in the latter cannot be legally binding for the ḥadd, unless it has been substantiated with a frank confession to a particular crime, such as zinā.
2. See Mu.C.1.B. c-, c/d-; and cf. synopsis C below.
3. Abū Dāwūd has even a better version for this particular point. He states: "On the authority of Aḥmad b. Ishāq al-Ahwāzī - going back to - Abū Burayda who said: 'We, the Companions of the Prophet, used to say that had the

Ghāmidīyya and Ma<sup>o</sup>īz never gone back to the Prophet after their fourth confession, he would have never had them stoned to death; for he gave his orders to stone them to death only after their fourth appearance.'" Daw. Hudūd: C. 24, 16 (4434, p. 584).

4. Malik differentiates between Zāhirat al-ḥaml and ghay zāhirat al-ḥaml, whereby, the ḥadd punishment for the latter will not be postponed. See also al-Bājī, al-Muntaqā, vol. 7, p. 135 f. L. 34. al-Bājī ascribes a false opinion to Abū Ḥanīfa, in which he is alleged to have said that a pregnant woman should be stoned to death; for the postponement of the ḥadd makes the punishment void. Ibid., p. 136, L. 16. Cf. Ṭahāwī, Ikhtilāf al-Fuqahā, p. 141 f. and Ibn Qudāma, al-Mughnī, vol. 9, p. 47, L. 7.
5. See al-Bājī, op.cit., p. 136, L. 4.
6. See Bayhaqī, Manāqib al-Shafi<sup>o</sup>, vol. 1, p. 100; Ibn Abī Ḥatīm, Ādāb al-Shafi<sup>o</sup> na manāqibuhu, pp. 27-28; and Ibn Hajar, Tawāli al-Ta'sīs, p. 51.
7. Yet, he talked about the issues of the pericope. See Umm, vol. 7, p. 41, passim.
8. "Deux Editions Inconnes du Muwaṭṭa' " pp. 477-492.



9. See El. second edition s.v. "al-Anṣār".

10. Different and sometimes unrelated groups of Arabs have claimed the name of Azd as the common stock of their tribe. See El, second edition, s.v. Azd. It is not uncommon to see some authors, such as Nawawī and Zurqānī, providing a gloss for Ghāmid as a branch of the Juḥaniyya. See Sharḥ Nawawī, vol. 9, p. 138, L. 5; Zurqānī, vol. 4, p. 140, L. 10. But cf. Ibn al-Athīr, vol. 1, p. 57; vol. 6. p. 273 and Sam<sup>c</sup>ānī Kitāb al-Ansāb, pp. 145 ff, and pp. 405 f., and Ibn Qutaiba al-Ma<sup>c</sup>ārif; vol. 2, p. 49.

11. cf. Mālik's version, element -a- above:

"...and said to him that she had committed adultery..."

The juridical distinction between the two statements is that the confession made in Mālik's version is legally binding for its clarity and unambiguousness (akhbarathu annahā zanat) while Muslim's version, employing

"ṭahhirnī" cannot be legally binding for any type of ḥadd punishment unless, or until, it was clarified what type of crime had been committed. cf. Ibn Qudāma, al-Mughnī, vol. 9, topic 7183, p. 65. and Sarakhsī, al-Mabsūṭ, vol. 9. p. 93 f., Ibn Ḥazm, al-Muḥallā, vol. 11, p. 176 ff.

12. The component seems to be tendentious. The component has also been committed by Abū Dāwūd: See Daw: Ḥudūd: 24, H.16 (4433 vol. p. 583-4). cf. Ibn Ḥazm, al-Muḥallā, p. 179, L.1.

13. No one else, among the classical authors, however, incorporated the component of the guarantor in the pericope. The existence of this component shows that the culprit was stoned to death almost immediately after the delivery of the child. However, the component started to reappear during the post classical period. See Bagh. Maṣābih, vol. 2, ḥudūd, H.9, p. 44.
14. See Lisān, vol. 15, pp. 468-71.
15. Sharḥ Nawawī, on the margin of Qaṣṭalānī, vol. 9, p. 140.
16. Vol. 11, p. 178, L. 10.
17. See Sharḥ al-Nawawī, vol. 1, p. 20, L. 23. cf. J. Robson, "The transmission of Muslim's Ṣaḥīḥ" JRAS, 1949, pp. 46-60.
18. Sharḥ al-Nawawī, op.cit., p. 10, L. 38; and p. 20, L. 16.
19. Either Ibn Sufyān or a copyist is responsible for the alteration.
20. He embraced Islām in the year 7 of the Hijra. (d.21 in Syria). See Ibn Hajar, al-Isābā vol. 1, p. 413; Tahdhīb, vol. 3, entry 228, p. 124-5. But cf. Ibn Abdalbarr, al-Istī<sup>c</sup>āb, vol. 1. entry 614, p. 153.

21. See Shahrastānī, al-Milal wal-Nihal vol. 1, p. 90 f;  
al-Ash<sup>ḥ</sup>arī, Maqālāt al-Islāmiyya, vol. 1, p. 89;  
cf. <sup>ḥ</sup>Abd al-Qādir Jaylānī al-Ghunya, pp. 96-97; and  
Goldziher, Introduction to Islamic Theology and Law,  
pp. 171 f. cf. pp. 86-87.
  
22. See al-Ash<sup>ḥ</sup>arī, op.cit., Vol. 1, p. 118; Shahrastānī,  
op.cit., p. 89 f; and Abū <sup>ḥ</sup>Ubayd b. Salām, Kitāb al-'Imān,  
p. 102. Cf. Welhausen, The Religio-political factions, p. ; and  
Lings, M. "The seven deadly sins", SCR., 5 (1971),  
pp. 26-33. See additional note (51) below.
  
23. Shahrastānī, op.cit., pp. 89 f.; Welhausen, op.cit., p.  
and El, second edition, s.v. Azāriḳa.
  
24. see Shahrastānī, op.cit., p. 91; <sup>ḥ</sup>Ammār, al Ṭā ibī.  
'Arā' al-Khawārij, pp. 136-44. cf. Goldziher,  
Intro. to Islamic Theology and Law, pp. 86-87, and 171 f.
  
25. The word Sunni has been used here to mean anti-khawārij  
and not to denote its technical meaning, i.e. the  
"Orthodox".
  
26. See al-Fiqh al-Akbar, with Māturīdī's commentary, p.2 ff.
  
27. A number of Prophetical ḥadīths identifying or restricting  
the grave sins and sinners as well as stating their  
positions, came into existence. See Wensinck, The  
Concordance, s.v. Kabīrat and Kabā'ir; and Handbook,

s.v. sins. Cf. Lings, M. 'The seven deadly sins',  
SCR, 5 (1971), pp. 26-33.

28. The issue came to be known as: istitābat al-murtaddīn and has been traditionally linked with Abū Bakr's involvement in the so-called: Hurūb al-Ridda. See Han. vol. 2, pp. 423, 528, 529; Bu Zakāt: 1 and 40, Mu. Tahāra: H. 32; Daw. Zakāt: 1; Tir. Īmān: 1, Nas. Zakāt: 3, Jihād: 1; Tahrīm al-dam: 1. Similarly, the punishment of the murtadd has been associated with the Hadīth of Banū ʿUrayna, see Han. vol. 3, pp. 107, 163, 170, 177, 186, 198, 205, 233, 287 and 290; Tay, H. 2002; Bu.Jihād: 152; Maghāzī: 36, 37, Hudūd: 15-18, Diyāt: 22; Mu. Qasāma: H.9-14; Daw. Hudūd: 3; Tir. Tahāra: 55; Nas. Tahāra: 190, Tahrīm al-dam: 7 and 9; Jah. Hudūd: 20; (cf. Ibn Saʿd. vol. 2, p. 219 f; and Wāqidi, p. 240). However, the death penalty was eventually proclaimed to have been the recommendation of the Prophet: "He who abandons his religion, should be killed". See Ma Aḡḍiya: 18 H.1 (but cf. H.2); Tay, H.2689; Han. vol. 1, pp. 217, 282, 322, 282, 409, 430, 444, 464; vol. 5, p. 231; vol. 6, p. 58; Bu Maghāzī: 60, Diyāt: 6, Istitābat al-murtaddīn: 2, Aḥkāṃ: 12; Mu. Qasāma: H.25, 26, Imāra: H. 15; Daw. Hudūd: 1; Tir. Diyāt: 9, Hudūd: 25, Fitan: 1; Jah. Hudūd: 1 and 2; But cf. Q.2: 217, 5: 33, 54; and 9: 107-8.

29. Strangely enough, the quotation is not Qur'ān, or at least, cannot be found in the Qur'an, nor has it ever

been claimed to have been Qur'ān. The verse in question, however, is identified as Q.60:12; see Bu. Hudūd: (Sariqa) C. 8. H. 1. cf. Fath, vol. 15, pp.

30. Umm, vol. 6, p. 124 cf. Ibn. Ḥazm, al-Muḥallā, vol. II, pp. 124 ff.
31. Han, vol. 4, p. 109.
32. Ibid., pp. 143, 150. Daw. Imāra: C.7. Dar Zakat: 28.
33. Jah. Adab: 23
34. See Tahdhīb, vol. 4, entry 316, pp. 182-86.
35. Ibid., vol. 6, entry 608, pp. 310-15.
36. Vol. 16, p. 47 f.
37. Tahdhīb, vol. 4, entry 381, pp. 228-30.
38. Kharāj p. 97, L. 17. cf. Ibn Ḥazm, al-Muḥallā, vol. II, p. 168 f.
39. See Ibn Qudāma, al-Mughnī, vol. 9, p. 42, cf. Ibn Ḥazm, op.cit., pp. 244 ff.
40. See Mudawwana, vol. 16, p. 41.
41. ibid. See also al-Bājī al-Muntaqā, vol. 7, p. 134.

cf. Khaṭābī, Ma<sup>c</sup>ālīm al-Sunan, published in the Sunan Abī Dāwūd, vol. 4, p. 589.

42. Mudawwana, op.cit.

43. Ibn <sup>c</sup>Arabī states:

al-Masālik, Ms. Fez. No. 180, fol. 218.

44. However, Zurqānī, rightly points out that there are other versions which state specifically that Muḥammad never offered his prayer. Zurqānī, vol. 4, p. 141. Ibn <sup>c</sup>Arabī rejects all versions which claim that Muḥammad had offered his prayer. al-Masālik, MS, op.cit., cf. Ṭahāwī, Mushkil al-Ālhār, vol. 1, pp. 176-73. cf. Umm, vol. 6, p. 143.

45. Muslim's immediate transmitter is Muḥammad b. al-<sup>c</sup>Alā; Abū Kurayb, from Yahyā b. Ya<sup>c</sup>lā (a qāḍī at Kūfa - d. 216 - see Tahdhīb, vol. 11, entry 585, p. 303) from Ghaylān (d. 132 - see ibid., vol. 8, entry 464, pp. 252-53).

46. Abū Ishāq Ibrahim b. Muḥammad b. Sufyān, d. 308. See Sharḥ Nawawī, vol. 1, pp. 17 ff.; cf. Robson, J. "The transmission of the Muslim's Ṣaḥīḥ" JRAS (1949), pp. 46-60.

47. Sharḥ al-Mawawī, op.cit., p. 42 ff.

48. p. 98, L. 7.
49. Ibid., cf. Sarakhsī, al-Mabsūt, vol. 9, pp. 73 and 91.  
f. p. 52.
50. Muwatta' al-Imām. Hudūd, C.3.
51. For more information about <sup>مركب الذنوب</sup> the topic consult the following articles. Elden, E.E. "The development of the Muslim doctrine of sins and their forgiveness" MW 29 (1939), pp. 178-188; Cook, F.T. "Sins and their punishment in Islām" MW 28 (1938), pp. 272-278, cf. Blasded, R.A. "The Muslim attitude towards sin" MW 31 (1941), pp. 145-148; and Ḥusain, Syed Mu<sup>c</sup>azzam. "Effect of Tawba (repentance) on penalty in Islām" Is. stud. 8 (1969), pp. 189-198.

#### NOTES TO CHAPTER 4

1. Sam<sup>c</sup>ani states that the Juhani is a sub clan of the Qudā<sup>c</sup>a, sometimes known as the Juhaina. al-Ansāb, p. 145f.; See also Ziriklī, al-A<sup>c</sup>lām, vol. 2, p.140, s.v. "Juhaina"; Under "Qudā<sup>c</sup>a", Sam<sup>c</sup>ani states that the Qudā<sup>c</sup>a is a sub tribe of the Adnān and that the Juhayna originates from Qudā<sup>c</sup>a. Ibid. p. 456 f. Nothing there has been mentioned about the Ghāmid. Ziriklī states that the Ghāmid originate from Qaḥṭān, see al-A<sup>c</sup>lām, vol. 5, p. 306. This, should be noted, means that the Juhayna tribe is different from the Ghāmid tribe. The former belongs to the so-called the Northerners, amongst whom are the Quraysh. The latter belong to the so-called the Southerners amongst whom are the Qays. However, under the Qudā<sup>c</sup>a, Ziriklī supports the view which considers the Qudā<sup>c</sup>a as being the descendants of Qaḥṭān. al-A<sup>c</sup>lām, vol. 6, p. 44. This would make the Juhayna and the Ghāmid two related tribes or a single tribe.(!)
2. Ibn <sup>c</sup>Arabī points out that the information means that the woman was obviously pregnant at the time of her confession. Bughyat al-Masālik, Ms. Rabāṭ, No. 8985, vol. 2, section of Rajm, n.p.n. cf. al-Bājī, al-Muntaqā, vol. 7. p. 136, L.4. Muslim's immediate transmitter is Mālik b. <sup>c</sup>Abd al-Wāhid al-Misma<sup>c</sup>ī, a Baṣran transmitter, d. 130. See Tahdhīb, vol. 10, entry 27, p. 20. In fact the isnād is distinctively Baṣran; Mu<sup>c</sup>ādh b. Hisham, is Baṣrān,



d. 200, so is his father. Ibid., vol. 10, entry 376, pp. 196-7.

3. Cf. n.1. Chapter 3 above.
4. Perhaps it is not a coincidence that both Muslim and Abū Dāwūd should employ the word "ṭahhirnī" in some of their versions of both Mā<sup>c</sup>iz and Ibn Ghamidiyya pericopes. However, although Mā<sup>c</sup>iz there was equally reported to have been turned away several times, the Prophet was eventually reported to have asked the man: "From what should I purify you? (fī mā uṭahhiruka?). "From adultery" the man replied. Similarly, the Ghāmidīyya was eventually reported to have said: "anā ḥublā" as protest for being turned away.
5. This is in line with Mālik's opinion that only the obvious or proved pregnancy can save the culprit from the immediate punishment.<sup>1</sup> Otherwise she should be punished immediately. Istidhkār, Dār al-Kutub, Ms. No. 24, Ḥadīth, fol. 246. cf. Daw. Hudūd: 24; Nas. Janā'iz: 64 and Han. vol. 5, p. 42.
6. For this could also imply that the culprit was a slave, a minor, or simply an unmarried. In either case, according to the Fiqh, the culprit should not be stoned to death. See Chap. 13 below. Cf. Bu. Buyū<sup>c</sup>: 66 and 110, <sup>c</sup>Itq: 17; Hudūd: 35, 36; Mu. Hudūd: H.31, 32; Daw. Hudūd: 32; Tir. Hudūd: 8, Jah. Hudūd: 14, Han: vol.4, p. 343.

7. See Lisān, s.v. "w-l-y" cf. Yahyā b. Sallām, al-Taṣārīf, pp. 235-38.
  
8. Ibid., pp. 235-40; See Fiqh works, s.v. "Nikāḥ", "Ṭalaq" and "Waṣiyya" etc.
  
9. Nawawī concludes by saying: "The culprit in question must have been Muḥṣanah (non-virgin) otherwise she would not have been stoned to death". See Sharḥ Muslim, vol. 9, p. 138.
  
10. See Chapter 13, RAJM, below.
  
11. cf. Khatābi, Ma<sup>c</sup>ālīm al-Sunan, in Sunan Abī Dawūd, vol. 4, p. 589-90; Ibn <sup>c</sup>Arabī, Tir. vol. 6, p. 212 f. But cf. Sharḥ al-Nawawī, vol. 9, p. 138 ff.
  
12. Abū Dawūd provides a single rubric, under which two pericopes, one identifies its culprit as the Juhaniyya and the other as the Ghāmidīyya, have been incorporated. The rubric reads:  

"A chapter concerning the woman of Juhayna who was stoned to death in accordance with the orders of the Prophet". Daw. Hudūd. C. 25.

After the two pericopes, Abū Dawūd says:  

"Ghassānī said to me that Juhayna, Ghāmid and Bāriq are names referring to a single tribe". Ibid. vol. 4, p. 590. cf. n. 1, p. 589 f.
  
13. The basic unit of the story of the Ghāmidīyya, however,

seems to have been freely available at the time of Abū Yūsuf. See Kharāj, p. 98.

14. This will count for the inconsistencies and contradictions to be found in the Ghāmidiyya's versions as opposed to relatively less contradictions in the story of the Juhaniyya. Cf. Synopses C above and D below.
15. Mālik's version, as we have seen, has an incomplete isnād which was never repeated again.
16. This is particularly so with reference to Abū Dāwud. See Daw. Hudūd: C. 25. cf. Robson, J. "The isnād in Muslim tradition" Glasgow Univ. Or. Soc. Trans. 15 (1953-54), pp. 15-26; and "Standards applied by Muslim traditionists" Bull. John Rylands Lib. 43 (1961), pp. 459-479.
17. See Synopsis C above, cf. Synopsis D below.
18. Shāfi<sup>C</sup>ī transmits a ḥadīth which says:  
"The Prophet had stoned to death a man of Aslam tribe, a Jewish couple and a woman".  
Umm, vol. 0, pp. 000; See also San<sup>C</sup>ānī, al-Muṣannaf, vol. 7, H. 13333, p. 319; cf. Risāla, nos. 691-2 and 1125-6; Han. vol. 1, pp. 93, 107, 116, 121, 140, 141, 143, 153; vol. 5, pp. 36 and 178; Mu. Hudūd: C.6, H. 6 and 7; Daw. Hudūd: C. 26, H.11 (vol. 4, p. 601).

19. See Tahdhīb, vol. 1, entry 175, p.101 f; cf. al-Dhahabī, al-Mughnī, fil-du<sup>c</sup>afa', vol. 1, p.8.
20. The pericope, should be noted, exhibits the validity of a single confession to adultery, and that Abbān represents Baṣran opposition to Kūfan attitude concerning confession to adultery.
21. He was a judge of Medina, presumably under the Abbāsids. See Tahdhīb, vol. 11, entry 746, p. 385.
22. But cf. Chapter 3, n.1. above.
23. See p. 73 above.
24. See p. 74 above.

## NOTES TO CHAPTER 5

1. To get out of the problem, Ibn <sup>C</sup>Abdūlbarr suggests the priority of the incident to the revelation of the Qur'<sup>ān</sup> dealing with the Ifk. al-Istidhkār, Dār al-Kutub, MS 24, vol. 2, fol. 247 f. see n. 15 below.
2. This is peculiar for the Muslim jurists; because, for them, crimes against religion, such as zinā, should not be pursued. Ibn Ḥajar noticed this peculiarity in the ḥadīth when he said:  
  
Fath, vol. 15, p. 153 cf. al-<sup>C</sup>Aynī, Umdat al-qārī, vol. 14, p. 5.
3. See Burton, CQ, p. 76.
4. cf. Ṭabarī, Ikhtilāf al-fuqahā', edited by F. Kern, p. 145 f. al-Wāḥidī alleges that Q. 2:188 was revealed after a dispute between Imru'ul-qays b. <sup>C</sup>Ābis al-Kindī and Rabī<sup>C</sup>a b. <sup>C</sup>Idān al-ḥadramī. See Asbāb al-Nuzūl, p. 35; cf. al-Qurtubī, vol. 2, pp. 338-41 and vol. 5, pp. 149-56. For the biography of the disputing parties, see Ibn <sup>C</sup>Abdūlbarr, al-Istī<sup>C</sup>ab, vol. 1, entry 131, p. 50 and Ibn Ḥajar, al-Isāba, vol. 1, entry 246, p. 123 f; and entry 2605, p. 1044.
5. Zuhri (d. 124) is offered as the common link for all versions of this story.

6. See Lisān, s.v. "n-sh-d" and "s- ' -l". cf. Han. vol. 4, p. 98, L.5.
  
7. But cf. Lisān, s.v. "<sup>C</sup>asīf" and Ibn Hajar, Fath, vol. 15, p.151; Zamakhsharī, however, states that <sup>C</sup>asīf means also a dispicable slave, see al-Fā'iḡ fī Gharīb al-hadīth, vol. 2, pp. 7, 429 and vol. 3, p. 246.
  
8. There are a number of interesting anecdotes on Sufyān b. <sup>C</sup>Uyayna. See Tahdhīb, vol. 4, entry 205, pp. 117-22.
  
9. But cf. Fath, vol. 15, p. 152 and al-<sup>C</sup>Aynī, <sup>C</sup>Umdat al-qāri, vol. 24, p. 5.
  
10. Yaḥyā b. Sa<sup>C</sup>īd (d.s. 144 - see Tahdhīb, vol. 11, pp. 221-24) is reported to have said to Ibn <sup>C</sup>Uyayna:  

"You used to record the hadīths, but nowadays you relate them either with additions or with some omissions, why?"

"My dear friend take what I had transmitted earlier"

replied Sufyān.

Tahdhīb, op.cit., p. 121, L. 2.
  
11. cf. M. Cook, Early Muslim Dogma, pp. 107-116.
  
12. Ibn Ḥanbal knows a prophetic hadīth which forbids the usage of za<sup>C</sup>amū. Han. vol. 4, p. 119, and vol. 5, p. 401. But Bukhārī knows a contrary prophetic tradition, see Bu. Adab: C. 94, H.1.

13. Ibn <sup>c</sup>Abdulgarr suggest that it will be erroneous to postulate that the Kitāb Allāh must be a reference to the Qur'ān; for there is no mention of the SP in the Qur'ān. If one must understand the Kitāb Allāh as being a reference to the Qur'ān, then one must understand that the only possible quranic verse will be Q.2.188."  
al-Istidhkār, Dār al-Kutub, MS. No. 24 Ḥadīth, vol. 2, fol. 247. cf. Ibn Qutaiba, Ta'wīl mukhtalaf al-ḥadīth, pp. 93-95; and Gharīb al-ḥadīth, vol. 1, p. 268 f.
14. See Chap. 9 below.
15. See the "Ḥadīth al-Ifk". Ibn Hishām Sira, vol. 2, pp. 247-307; Bu. Maghāzī: C.12, 34, 32; Daw. Salāt: 122; cf. Han. vol. 6, pp. 194, 195, 197; Bū. Shahādāt: 15; Tafsīr: Sūra. 12 and 24; Aymān: 13, 18; I<sup>c</sup>tiṣām: 28; Tawhīd: 35, 52. But cf. Shi<sup>c</sup>'is' position on the "Ḥadīth al-Ifk". See Ja<sup>c</sup>far Murtadā, Ḥadīth al-Ifk, pp. 239-267. See also Wansbrough, SM, pp. 76-9, passim.
16. See Qaṣṭalānī, Irshād al-Sārī, vol. 6, p. 53, L.15.
17. Mabsut, vol. 9, p. 92 f. See also Zayla<sup>c</sup>ī, Naṣb al-Rāyah, vol. 3, pp. 314-16 particularly p. 315, L. 8. Sharḥ al-<sup>c</sup>Aynī, vol. 24, p. 15.
18. The involvement of the pericope with the ḥadd punishment/s for adultery must have been achieved after the amalgamation of the Unit 1 and the Unit 2. Prior to that, it would

appear, the pericope, that is the Unit 1, was adduced for illegal possession of others' property. See Bu. Sulh: C.5. H.1.

19. See Tahdhīb, vol. 5, entry 81, pp. 49-51.
20. Ibid., vol. 9, entry 503, pp. 303-7.
21. Bāb al-bikrān yujladān wa yunfayān. Ibn Hajar points out that the rubric is a ḥadīth. Fath, vol. 15, p.170.
22. This kind of solution was first offered by Ḥammād (a teacher of Abū Ḥanīfa, d. 120, see Tahdhīb, vol. 2, entry 15, pp. 16-18) but was rejected by both Nakha<sup>cī</sup> (the teacher of Ḥammād, d.c. 98, see Tahdhīb, vol. 1, entry 325, pp. 177-79) and Abū Hanīfa. Shaybānī, Kitāb al-Āthār, Dār al-Kutub, Cairo, MS No. M104 Ḥadīth, fol. 88. cf. San<sup>c</sup>ānī, al-Muṣannaf, vol. 7, H.13313, p.312; H. 13319, p. 314; H. 13327, p. 315; H.13357, p.328 and H. 13361, p. 329.
23. See Qaṣṭalānis' commentary, Irshād al-Sāri, vol. 6, p. 52 f.
24. See Lisān, s.v. "ammā".
25. See Shāfi<sup>cī</sup>, Risāla, nos. 630, 998-1261; cf. nos. 1807-1811; Umm, vol. 7, pp. 250 ff; Fayrūzabādī, al-Tabṣirat, pp. 298-316. cf. Schacht, Origins, pp. 28, 50 ff.



26. However, it was not long before his connection with Zahrī came to be questioned by later traditionists. See Tahdhīb, vol. 9, pp. 304-307.
27. But cf. Daw. Adab: C. 80, H. 1 (4972). See also, Khaṭṭābī, Ma<sup>c</sup>ālim al-Sunan, ibid., vol. 5, p. 254, n.2.
28. See Ibn Qutaiba, Gharīb al-hadīth, vol. 1, p. 268 f.; Ta'wīl mukhtalaf al-hadīth, pp. 93-95; Ṭaḥāwī, Mushkil al-Āthār, vol. 3, pp. 2-6. Ibn Arabī, Sharḥ Saḥīḥ al-Tirmidhī, vol. 6, p. 205 f. cf. p. 217; cf. Wansbrough, QS, pp. 75 ff; and Burton, CQ, pp. 75 ff.
29. However, Ṭabarī, who never assented to the view that SP is/was a quranic punishment, transmits a version of the story of the JC in which the missing verse is identified as: "I dhā zana minkum aḥadun farjumūh". See Ṭabarī, Sūra 4: 41. But cf. Fath, vol. 15 p. 184 f where Ibn Ḥajar identifies the missing verse in the Torah as:
- al-muḥṣan wal-muḥṣana Idhā zanayā faqamat  
<sup>c</sup>alayhimā al-bayyina rujimā, wa in kānat  
 ḥublā turubbiṣa bihā ḥattā taḍa<sup>c</sup> mā fī baṭniḥā.
- See also Daw. Hudūd: C. 26, H. 8. (vol. 4, H. 4452, p. 600 f) where he offers a different verse.
30. See Ibn Hishām, Sīra, vol. 1, pp. 564-66. and Ibn Ḥajar, Fath, cf. Wensinck, Muhammad and the Jews of Medina, pp. 33-38; cf. pp. 6-32, and 39 ff.
31. See Wansbrough, QS, pp. 193-6, 198; and Burton, CQ, p. 72 f.

32. Ibid., pp. 74-104.
33. Ibid., pp. 93, passim. cf. Shāfi<sup>c</sup>ī, Risāla, nos. 312-345 and 375-392; and Hibatulla Ibn Salāma, al-Nāsikh wa al-Mansūkh, on the margin of al-Wāḥidi, Asbāb al-Nuzūl, pp. 9-14.
34. But cf. Bay. Hudūd: C.11, H.1, 2; and Hak. Hudūd: H.42.  
See also synopsis F. below.
35. See Ṭaḥawī, Mushkil al-Āthār, vol. 2, pp. cf.  
al-Ḥāzimī, al-Nāsikh wa al-Mansūkh, pp. 369-377.  
Shanqīṭī, Adwā' al-Bayān, vol. 6, pp. 6 ff.

## NOTES TO CHAPTER 6

1. But Ibn Ḥanbal transmits two versions of the same pericope in which Ibn ʿAbbās is reported to have said: "I was told by ʿAbd al-Raḥmān b. ʿAwf that he had heard ʿUmr b. Khaṭṭāb addressing a crowd saying...". Han. vol. 1, p. 29, L.17 and p. 50, L.6.
2. cf. Wansbrough, QS, pp. 74-6 and 161; Burton, CQ, p. 70 ff.
3. cf. Burton, "The meaning of Iḥṣān", JSS (1975), pp. 47-75; Wansbrough, QS, p. 193, and n. 4; See below Chap. 14.
4. See Chapter 9, 10 and 11 below.
5. For instance, with the exception of Mālik, most of the early jurists did not consider ḥabal as a sufficient proof to convict a culprit unless when such evidence was reinforced by self-confession. Ibn ʿAbdūlbarr, al-Istidhkār, Dār al-Kutub, Cairo, MS No. 24 Ḥadīth, fol. 248b; Muwattaʿa, Ḥudūd; C.4, H.1. Cf. Ibn Qudāma, al-Mughnī, vol. 9, pp. 79 ff. See also Chapter 11 below.
6. Cf. Burton, op.cit.
7. Ibn ʿAbdūlbarr, however, insists that Ibn Musayyib attended personally this pilgrimage and that he had heard the pericope directly from ʿUmar in Medina and

that at that time he was a boy of 8 years. al-Istidhkār, op.cit., fol. 249a. But Ibn Ma<sup>c</sup>īn (a prominent Irāqī traditionists, and a teacher of Ibn Ḥanbal and Bukhārī, d. 233 - See Tahdhīb, entry: 561, vol. 11, pp. 280-88) - was of the opinion that Ibn Musayyib could not have heard or received a single ḥadīth directly from <sup>c</sup>Umar whom he had met when he was a boy of two years old. Ibid. L.8. Similar objection was raised by Aḥmad Shākir. See Han. Shākir's edition, vol. 1, H. 246, 249 and 109. But cf. Shāf<sup>c</sup>'s attitude towards the "marāsīl" of Ibn Musayyib, Risāla, nos. 1262-1308; and cf. Shākir's reply to that view, ibid. Shākir's edition of the Risāla, p. 465, n.1.

8. Muwatṭa' Shaybānī, p. 241. Cf. "Strait (is) the gate, and narrow (is) the way". N.T., Matt., 7.14; "Turn neither to right nor to left, Keep your foot clear of evil". O.T., Pr. 4. 27.
9. al-Istidhkār, op.cit., fol. 249a., L.2; cf. Zurgānī., vol. 4, p. 145; al-Bājī, al-Muntaqā., vol. 11, p. 42; Ibn <sup>c</sup>Āshūr, Kashf al-Mughatṭā, p. 311.
10. Ikhtilāf al-Ḥadīth, on the margin of the Umm., vol. 7, pp. 250-1.
11. Zurgānī, op.cit.

12. cf. "... min qabīl kashfihi al-nūrānī al-mu<sup>c</sup>tād minhu...".

Ibn <sup>c</sup>Āshūr, op.cit., cf. also Ibn Ḥajar:

Wa qad waqa<sup>c</sup> mā khashiyahu <sup>c</sup>Umar ayḍan  
fa' ankara al-Rajma ṭā'ifatun min al-Khawārij aw  
mu<sup>c</sup>ḡamuhum wa ba<sup>c</sup>ḍ al-Mu<sup>c</sup>tazila.

Fath., vol. 15, p. 160, L. 10. In fact Ibn Ḥajar goes on to provide a version from Ṭabarī in which <sup>c</sup>Umar's warning is explicitly shown to have been based on what Ibn Ḥajar calls: "Tawqīf" for <sup>c</sup>Umar (revelation?) See Wansbrough, QS, p. 103, ibid. See Suyūṭī, Tārīkh al-khulafā', s.v. "muwāfaqāt <sup>c</sup>Umar", p. 122-25.

13. Ibn <sup>c</sup>Arabī says that during his own time he had met some people of the Barbar tribe who rejected the SP and many other Islamic obligations, such as ritual ablution (wudu'). al-Masālik, Fez, MS 180, fol. 217. cf. Ibn Ḥajar, op.cit.

14. Ibid.

15. See al-Bājī, al-Muntaqā, vol. 7, p. 140, L. 6.

16. See Ibn <sup>c</sup>Āshūr, op.cit.

17. Classical collections have produced different constructions for the opposition/s.

"What is this SP! We have only "Flogging" in the Book of God". Han. vol. 1, p. 29 and 50 cf. pp. 36 and 43.

"We do not find the SP in the Book of God". Bu. Hudūd:

C.30 and 31; Mu. Hudūd: C. 15; Daw. Hudūd: C. 23 and Jah. Hudūd: C. 9. cf. Han. vol. 1, pp. 33, 107, 116, 121, 141 and 153; Bu. Hudūd: C. 6.

18. This is the attitude of Shāfi<sup>c</sup>ī which he has persistently claimed in his writings. See Risāla, nos. 225-7, 235, 275-392, 616, 649, 682-95, 1125 and 1126. cf. nos. 278-81, 286-309, 326, 419, 457, 479 and 214-35, 466-85, 1610-21.
19. This then is a reference to the Khawārij.
20. But cf. "Kitāb Allāh" in the Story of the <sup>c</sup>Asīf, above.
21. See Burton, CQ, p. 72 passim.
22. Ibid. p. 77 ff; but cf. Ibn Hajar, Majma<sup>c</sup> al-Zawā'id, vol. 6, p. 265, where the maxim is put into the mouth of the Prophet.
23. See Lisān, s.v. "āyat" and " q-r-' "; cf. Wansbrough, QS, p. 18 passim and Burton, CQ, p. 100 passim.
24. See Yahyā b. Sallām (d.200), al-Taṣārīf, pp. 248-9.
25. Burton, CQ, p. 101.
26. Ibn <sup>c</sup>Abdūlbarr points out that this component, i.e. "For the Prophet had stoned", is the only part of Ibn Musayyib's pericope which can be claimed to have a full

isnād going back to the Prophet. Tamhīd, Dār al-Kutub, Cairo, MS no. 215, Ḥadīth, fol. 131; Rabāṭ, no. 13J vol. 2, fols. 73-74; cf. Tajrīd al-Tamhīd, p. 210.

27. Ma. Qadar: C. 3; Han. vol. 3, p. 26; Daw. Manāsik: C.56 and Jah. Manāsik: C. 84. Cf. Han. vol. 3, pp. 14, 17; Tir. Qadar: C. 17. See Wensinck, Concordance, s.v. "Sunna" and "Farāḍa".

28. See al-Bājī, al-Muntaqā, vol. 7, p. 140.

29. Bājī, however, provides a super interpretation for Mālik's gloss: "yurīdu biḥālīka al-muḥṣan wal-muḥṣana; li anna al-thuyūba fī al-ghālib yakūn bihā al-iḥṣān..." Ibid. Similarly, Zurqānī offers the following interpretation: "...ay al-muḥṣan wal-muḥṣana wa in kāna shaybayn lā ḥaqīqat al-shaykh, wa huwa man ṭa<sup>c</sup>ana fī al-sinn...", Sharḥ al-Zurqānī, vol. 4, pp. 145-6. Cf. Burton, CQ. p. 75.

30. The employment of these two terms, thayyib and thayyiba, and not muḥṣan and muḥṣana, appears to me to be among the earliest attempt to harmonize the Qur'ān/fiqh conflict. The importance of the iḥṣān as a technical term can be seen from Zurqānī's comment, when he said: "wa innamā al-madār<sup>c</sup> alā al-iḥṣān". op.cit., p. 146.

31. Cf. Umm. vol. 5, p. 138 passim.

32. The incorporation of this component in a form of addendum reveals that Bukhārī was of the opinion that the source of the SP is the Sunna. Ibn Ḥajar goes into troubles to try to show that it is quite possible that Bukhārī had deliberately omitted the "shaikh and shaikha..." dictum from this pericope; on the ground that another colleague of Bukhārī - Ja<sup>c</sup>far al-Firyābī - had the same pericope from the same teacher of Bukhārī, going back to Sufyān, with the dictum as part of the ḥadīth. Firyābī's version appears in Nasā'ī (d.303), who, according to Ibn Ḥajar, concluded by saying: 'I know no one but Sufyān who incorporated in this ḥadīth: "the shaikh and the shaikha", he must be mistaken in doing so': (wa yanbaghī an yakūna wahima fī dhālik). But Ibn Ḥajar dismisses the last accusation by stating that the dictum has been transmitted by Mālīk, though he admits that most of the prominent transmitters, such as Yūnus, Ma<sup>c</sup>mar, Ṣāliḥ b. Kīsān and including Mālīk(!) have transmitted the pericope from Zuhri without the dictum. Fath, vol. 15, pp. 155-6. See also, Burton, CQ, p. 79. Sarakhsi considers the dictum to be the product of Islām's enemies. See Usūl, vol. 2, p. 78 f.
33. See Burton, CQ, pp. 68 ff; but cf. Wansbrough, QS, pp. 192-202, where he discusses dispensation/abrogation, and Rippon, Asbāb al-Nuzul, chapter 1V, see n. 49 below.
34. See EI, first edition, s.v. Kuraish.
35. Han. vol. 1, pp. 55 f, cf. vol. 5, p. 434; Bu. Ahkām, C.51; Mazālim: C. 19; Fadā'il aṣḥab al-Nabiyy: C.5;



Hudūd: C. 31; Ashriba: C. 3.

36. Ibn Hishām transmits the story in a more decorative manner occupying almost six pages. Sīra, vol. 2, pp. 656-61. The incorporation of this episode into a work primarily designed for the biography of Muḥammad is not insignificant; it shows that Ibn Ishāq was already concerned about the SP dispute.

37. Although Shāfi<sup>C</sup>ī was the very person to invent this mode of abrogation, he never considered the question of the SP as an instance of naskh al-tilāwat dūna al-ḥukm. See Burton, CQ, pp. 86 ff.

38. Muslim transmits a complete independant pericope on this particular issue as follows:

On the authority of Abū <sup>C</sup>Uthmān (al-Nahdī):

When Ziyād was branded with his new name,

I met Abū Bakra (Nufayl b. Ḥārith b.

Kalāda al-Thaqafī) and said to him: "What

have you done? I have heard Sa<sup>C</sup>īd b.

Abī Waqqāṣ saying: 'With my own two ears,

I have heard the Prophet saying: He who

claims the fatherhood of anyone else

beside his real father, Paradise is for-

bidden to him' ".

Abū Bakra replied: "I too have heard it from the Prophet".

Mu. 'Imān. 113.

Ziyād was a son of Sumayya, a slave woman belonging to Ḥārith b. Kalāda al-Thaqafī, and Abū Bakra was a brother of Ziyād sharing one mother. Originally, Abū Bakra was an Abyssinian slave who was affiliated to the tribe of al-Ḥaritha. He was emancipated by Muhammad after the siege of Ṭā'if in the year eith of the Hijra. There are a number of stories concerning quarrels between himself and his half-brother, Ziyād. For more information concerning both men see Bukhārī, Kitāb al-Shahādāt, and Ghazwat Hunayn in the Maghāzī section. See also, Fath, vol. 15, pp. 56-57: Kitāb al-Farā'id: C. Man idda<sup>C</sup>ā ilā ghayr abīh.

39. See Han. vol. 1, pp. 47 and 55 (Do not disassociate yourselves from your fathers. .); and "No one knowingly disassociate oneself from one's father but Hell will be appropriate place for such person" Han. vol. 2, p. 118; vol. 5, pp. 38 and 46; Bu. Manāqib: C.5; Farā'id: C. 29; Mu. 'Imān: 112, 114, 115; <sup>C</sup>Itq: 21; Tir. Waṣāyā: C. 5; Walā: C. 3; Jah. Hudūd: C. 36; Waṣāyā: C. 6; Dār. Siyar: C. 82 and Farā'id: C. 2.
40. See Wensinck, the Concordance, s.v. ṭarā. Ibn Hajar provides us with an appropriate reason for such pericope. The reason for the prohibition of overrating the Prophet arises from an incident at which Mu<sup>C</sup>ādh b. Jabal sought permission from the Prophet to bow in front of him. The Prophet refused it and said:...." Fath, vol. 15, p. 161. This section has also been reported as an

independent pericope by a number of traditionists.

See Han. vol. 1, pp. 23, 24, 47 and 55; Bu. Anbiyā': C. 48; Dār. Riqāq: C. 68.

41. The incorporation of this particular pericope under this rubric might be thought to represent Bukhārī's attitude concerning the validity of a single confession to adultery. Cf. Fath, op.cit., p. 148 (waḥtajja man iktafā bil-marrat bi'itlāq al-i<sup>c</sup>tirāf fī al-ḥadīth) L.15.
42. See Fath, op.cit., p. 155.
43. All classical traditionists related the pericope to Ibn <sup>c</sup>Abbās via Zuhri. It is rather strange to see that no one but Ibn <sup>c</sup>Abbās should relate this important pericope which was allegedly given at a public meeting. Even more strange is to see none but Zuhri alone relating it from Ibn <sup>c</sup>Abbās. I may refer here to the suggestion of M. Cook who noted that the so-called forking isnād can hardly establish a terminus ante quem. See Early Muslim Dogma, pp. 107-116.
44. See Fath, op.cit., p. 155 and 160.
45. Ibid. See also Ṭahāwī, Bayān mushkil al-ḥadīth, vol. 2, pp. 2-6; cf. Burton, CQ, p. 74 passim.
46. Ibid., p. 76 ff.

47. The earliest report which claims that the SP was part of revelation of God is the story of the Saqifa in the Sira. Similarly, the earliest report concerning how the alleged SV disappeared was reported by Ibn Ishāq on behalf of the opponents of the SP. See Ibn Qutaiba, Ta'wīl mukhtalaf al-hadīth, pp. 310-15. The involvement of Ibn Ishāq in both accounts is very significant indeed. It shows that the SP dispute was already known by the year 150 and, at the same time, it gives an explanation to why the Story of <sup>c</sup>Umar should be included in the Sira of the Prophet. Conversely, Ibn Ishāq's failure to include in the Sira any other Prophetical hadīth dealing with the SP, apart from this story and the story of the JC, could be taken as a silent evident that the other Prophetical hadīths were not known at that time, or at least were not accepted yet as valid hadīths. Furthermore, the content of Ibn Ishāq's account, which explains how the alleged stoning verse disappeared, shows that the claim that the SP was part of the Qur'ān was already known before Shāfi<sup>c</sup>ī and that the earliest solution offered for the lack of the SV in the Qur'ān is that the SV had simply disappeared. The idea of being abrogated was not known yet. For more information on the SV see Fath, vol. 15, p. 156 ff. See also Chapter 13 below.
48. See Fath, op.cit., where Ibn Hajar tries in vain to link together the unrelated parts of the hadīth.

49. The question of haggadic material, primarily designed for "entertainment" and hence was composed in a story form, most likely for repetition, but later was adapted for and fixed in halakhic purposes, has been suggested by A. Rippon in his thesis on the asbāb al-nuzūl. He states: "It may be tempting for some to understand the exegetical procedure connected to the sabab are designed to promote the interpretation that what is stated in the Qur'ān 'really happened' and that the sabab is the proof of this fact - that is, that the sabab is a historical referent and was understood in that way by early Muslims. This, to me, would be a grave misunderstanding based on reading modern concerns into medieval literature. Rather, viewing the sabab as grounded in the basic haggadic notion of removing any ambiguity and of generating a story for repetition and (edifying) entertainment would seem far more satisfactory". A. Rippon, The Quranic asbab al-nuzūl material ... PhD. thesis, McGill Univ. 1981, chap.
50. Sīra, vol. 2, pp. 606 ff. Ibn Ishāq's immediate authority is ʿAbd Allāh b. Abī Bakr b. Ḥazm (d. 135 in Medina - See Tahdhīb, vol. 5, pp. 164-5). His pericope, however, was not known in Medina but in Irāq, where Ibn Ishāq had settled and died in the year 150/3. A similar version, but not without differences, is ascribed to Mālik, on the authority of Zuhri (!) going back to Ibn ʿAbbās. See Han. vol. 1, pp. 55-6; but cf. Shākir's edition, vol. 1, H. 391, pp. 323-327, n. 391. Ibn Ḥanbal

had received his version from Ishāq b. ʿĪsa al-Ṭabbāʿ<sup>c</sup> (d. 214 in Baghdād, see Tahdhīb, vol. 1, entry 459, p.245) The emergence of this version on the authority of Mālik raises some problems. If Mālik knew a complete pericope concerning the whole speech of ʿUmar with a complete isnād, why did he ignore it and instead rely on Ibn Musayyib's story which has no complete isnād? Assuming he did know Zuhri's version, why did he transmit only a section of it and not the whole pericope? Or why were other sections edited out? Further, why were none of the remaining sections ever transmitted by Mālik in his Muwattaʿa? Or, why did no one know about this version until the third century, almost 70 years after the death of Mālik? It seems to me that Ibn Ḥanbal's version was produced in place of Ibn Ishāq who was not considered by Ibn Ḥanbal to be trustworthy. See Tahdhīb, vol. 9, pp. 38-46.

51. cf. Schacht, Origins, p. 246, n. 5. Cf. Burton, "The origin of the Islamic penalty for adultery", Trans. Glasgow Univ. Ori. Soc., 26 (1975-6, published 1979), pp. 16-27. (I regret that at the time of sending these pages to the typist, I was not able to obtain a copy of the article. Hence, I may also refer to the Collection of the Qur'ān, pp. 68-104 and 194-6; cf. Wansbrough, SM, p. 79, and QS, pp. 193-6, and 198, cf p. 70).

52. Origins, pp. 163-75, cf. 38 f. passim.

53. Cf. ibid., pp. 27, and 243 ff.
54. This is not the terminus ante quem for the story of <sup>c</sup>Umar. The date is merely meant for the amalgamation of the materials contained in the Story.
55. See Burton, CQ, p. 105 ff.; cf. Wansbrough, QS, p. 43 ff. (cf. p. 202 ff).
56. Wheather this is a printers' error or not is not clear. But, certainly, it does not appear on the list of printers' error at the end of the book.

## NOTES TO CHAPTER 7

1. See Tahdhib, vol. 5, entry 189, p.111. cf. Ibn Sa<sup>c</sup>d, Tabaqāt, vol. 2, p. 374, .5.
2. Of all the traditionists, only Ibn Hanbal does offer once an alternative isnād going back to a different but very obscure companion, namely, Salam b. al-Muḥbiq, through Qubayṣa b. Ḥurayth (Baṣran, d.67). Han. vol. 3, p. 476. Bukhārī had this to say about Qubayṣa: "His ḥadīth needs a lot of care before it can be accepted". Tahdhib, vol. 8, entry 627, p. 345. Similarly, Nasā'ī said: "His ḥadīth cannot be authentic," while Ibn Ḥazm added: "He is a very weak transmitter; people have ignored him". Ibid. For Salama b. al-Maḥbiq, see Tahdhib, vol. 4, entry 270, pp. 157-8; cf. al-Isāba, vol. 2, pp. 230-31; b t cf. entry 6064, p.229.
3. The earliest place for the pericope is the Risāla of Shāfi<sup>c</sup>i and Umm. See Ris. nos. 378-81; Umm, vol. 6, p. 119; vol. 7, p. 76; and the Ikhtilāf al-ḥadīth, on the margin of the Umm, vol. 7, p. 252. Cf. Shākir's commentary on the Risāla, pp. 129-31, n.8-5 respectively. Also see Bayhaqī, Ahkām al-Qur'an pp. 303-07.
4. I do not accept Burton's view that Mālik must have been aware of the pericope. See CQ,p.81. On what grounds should the interpretation of shaikh and shaikha in the ḥadīth of <sup>c</sup>Umar mean awareness of the pericope of <sup>c</sup>Ubada?



Why does the employment of thayyib and thayyiba in the ḥadīth of Ubāda not exhibit awareness of Mālik's gloss? I have previously pointed out the possibility of deliberate adoption of this device by Mālik as the earliest attempt to harmonize between the ambiguous term: muḥṣan v. muḥṣana and the fiqh ruling for the SP. See Mā<sup>c</sup>iz pericope above, p. 51 ff.

5. On the contrary, we have ample proof that Mālik was against the imposition of two penalties particularly in the case of women. al-Mudawwana, vol. 16, p. 36 f.; Ibn <sup>c</sup>Abdulbarr, al-Istidhkār, MS, 24 Ḥadīth, Dār al-Kutub, Cairo, fols. 247 f.
6. Bu. Tafsīr: C.1, sūrat 4:15. But cf. al-<sup>c</sup>Aynī, who points out that the rubric does not appear in other recensions of Bukhārī but in al-Kashmayhanī's and al-Mustamlī's Umdat al-qārī, vol. 18, p. 162. Ibn Ḥajar states that there are many rubrics in the Jāmi<sup>c</sup> which do not belong to the author. See Hady al-Sārī, p. 5. A similar observation with respect to the rubric in question has been made by Ibn Ḥajar. See Fath, vol. 1, p.5.
7. But cf. Tafsīr Mujāhid, where the sentence is reported to be Mujāhid's own words, p. 14809; and Kitāb Tafsir al-Khams mi'at 'āyat, pp. 213-15. See also Tabarī, who rejects the ḥadīth of <sup>c</sup>Ubāda because it is weak, da<sup>c</sup>if, Jāmi<sup>c</sup>al-Bayan, on sūrat 4.
8. See p. 83 above.

9. A widow or widower or divorcee will all fall under the punishment of the married culprit. Similarly, the marital status of the culprit at the time of the offence is the main criterion in a case such as virgin v. non-virgin.
10. See Burton, CQ, p.72.
11. See Wensinck, the Concordance, s.v. 'akhadha".
12. But cf. Ibn Abbā's role above.
13. See Risāla, nos. 378 (but cf. Shākir's comment on the Isnād, n.8, p.129 f), 381 and 686; Umm, vol. 7, p. 75 f. See also Burton, CQ, p.90 ff; cf. Wansbrough, QS, p.193 f.
14. See Burton, CQ, pp.71, 89, 92, 105-7, but cf. pp. 50-59; Wansbrough, QS, p. 193; but cf. p. 150 ff.
15. See Burton, CQ, p. 91.
16. Risāla, nos. 375-392; Umm, vol. 7, p. 75 f.
17. But cf. Burton, CQ, p. 74 ff. passim.
18. Ibid.

19. See Wansbrough, "Majāz al-qur'ān: periphrastic exegesis", BSOAS 31 (1970), 247-66; also cf., "Arabic rhetoric and Qur'anic exegesis", BSOAS 31 (1968), 469-85 and QS, pp. 233-35.
  
20. See Hibatullah Ibn Salāma, al-Nāsikh wa al-Mansūkh, p.117 ff; cf. Burton, CQ, pp. 89,92, passim; and Wansbrough, QS, p. 193.
  
21. Ibn 'Abdūlbarr, al-Istidkhār, MS, Cairo, Ḥadīth 24, fol. 247 f. cf. Risāla, nos. 375 ff.
  
22. Tir. Ḥudūd: C. 7. H.1 and 2.
  
23. See Umm., vol. 7, p. 75 f., passim, cf. Burton, CQ, p. 90 f.
  
24. As far as the traditionists are concerned, the Ḥadīth appears as follows:  
San. vol. 7, H.13308, 13359, p. 329; Han. vol.3,p.476;  
vol. 5, pp. 313, 317, 318, 320, 321, 327;  
Bu.Tafsīr: 4 (Tarjama): Mu. Ḥudūd: 12-14, Daw:Ḥudūd:23;  
Tir. Ḥudūd: 8; Jah. Ḥudūd: 7, Dar.Ḥudūd: 19;  
Bay. Ḥudūd: 2, 13.
  
25. Tahdhīb, vol. 2, entry 488, pp. 262-70; cf. Schācht, Origins, pp. 87, 229, cf. 74 and 141.
  
26. Tahdhīb, vol. 2, entry 692, p. 396.

27. A number of Pr.F.P. scholars of Kūfa are reported to be in favour of the flogging plus SP for the married culprits. Their naṣṣ is either Ali's story or opinions of the early masters. None of these scholars, however, produced a prophetic ḥadīth to support his point of view. Among these scholars are:  
 Masrūq b. al-Ajda<sup>c</sup> (d.s. 63. See Tahdhīb, vol. 10, p. 109 ff., entry: 206). San. vol. 7, H.13361 p.329; and S. Thawrī (d.161, see Tahdhīb, vol. 4, pp. 111-115, entry: 199), San., ibid. H.13362, p. 329; cf. ibid. 13306, p.309, H.13307; H.13313, p. 312 and H.13327, p.315.
28. See Umm; vol. 7, p. 167, passim.
29. cf. Han. vol. 1, pp. 50, 29.
30. Han. vol. 1, pp. 93, 107, 116, 121, 140, 141, 143, 153.
31. Umm, vol. 7, p. 167, passim.
32. Tafsīr Mujāhid, p. 14809.
33. Bu. Tafsīr: Sūra: 4, cf. Fath, vol. 9, pp. 305 ff.

NOTES TO THE INTRODUCTION TO

SECTION II

1. The ḥadīth: "Ikhtilāf ummatī rahma" appeared first in the so-called al-fiqh al-akbar ascribed erroneously to Abū Ḥanīfa, (see Sharḥ al-fiqh al-akbar, with commentary by al-Māturīdī, p. 6, L. 18).

The maxim, which is not claimed there to be a prophetical ḥadīth, became much later a prophetical ḥadīth. See al-Munāwī, Abd al-Ra'ūf Tāj al-<sup>c</sup>Ārifīn, al-Taysīr bisharḥ al-Jāmi<sup>c</sup> al-Ṣaghīr, vol. 1, p. 49, L. 25; cf. al-Albānī, Nāṣir al-Dīn, Da<sup>c</sup>īf al-Jāmi<sup>c</sup> al-Ṣaghīr, vol. 1, H. 230, p. 111; cf. al-<sup>c</sup>Ajlūnī, Kashf al-Khafā', vol. 1, pp. 64-66.

Both Wensinck and Schacht have noticed that the maxim was not known to Abū Ḥanīfa nor to Shāfi<sup>c</sup>ī - nor the classical compendia knew it as such. See Wensinck, Muslim Creed, pp. 104, 112 f., and Schacht, Origins, p. 96 and n.2; cf. p. 95, L. 30 ff. and n.1.

2. The full title is: al-Inṣāf fī al-tanbīh <sup>c</sup>alā al-asbāb al-latī awjabat al-Ikhtilāf bayn al-Muslimīn fī ārā'ihim.

3. Ibid, p. 27, cf. the introduction by M.R. al-Dāyah, pp. 8 - 11; al-qāḍī al-Nu<sup>c</sup>mān, Kitāb ikhtilāf uṣūl al-madhāhib, pp. 3 - 11 (hereafter ikhtilāf); M.S. al-Khim, Athar al-ikhtilāf fī al-qawā'id al-uṣūliyyah fī ikhtilāf al-fuqahā', (hereafter ikhtilāf), pp. 35-38.

4. al-Inṣāf, p. 32 ff.; cf. al-Khinn, ikhtilāf, pp. 68-90.
5. al-Inṣāf, p. 71 ff. cf. Wansbrough, QS, pp. 236-7; for the historical development and its usage and function, see Wansbrough, "Majāz al-Qur'ān" BSOAS, 33 (1970) pp. 247-66.
6. al-Inṣāf, pp. 123 ff.
7. Ibid., pp. 159 ff. See also Shāfi<sup>c</sup>ī, Rasāla, nos. 179 - 257. Cf. Wansbrough, QS, pp. 178, passim; Colder, The Structure of Authority in Imāmī Shī<sup>c</sup>ī Jurisprudence, Ph.D Thesis, SOAS, 1980. pp. 175 ff.; al-Khinn ikhtilāf, pp. 291-228; and <sup>c</sup>Abd al-Majīd, al-Ittijāhāt al-fiqhīyyah, pp. 236-39.
8. al-Inṣāf, pp. 171 ff.; cf. Risāla, nos. 758-960.
9. al-Inṣāf, p. 207; cf. Risāla, nos. 1377 - ff.; as synonym of qiyās, no. 1323 ff.; cf. al-qādī al-Nu<sup>c</sup>mān, ikhtilāf, pp. 199-233; and al-Khinn, ikhtilāf, p. 387 ff.
10. al-Inṣāf, p. 211. Cf. Risāla, nos. 312-420, passim. For its historical transaction (supersession/abrogation) see Wansbrough, QS, pp. 195-200.; cf. Burton, CQ, pp. 18 ff. passim. See also, Ismā<sup>c</sup>īl, Sha<sup>c</sup>bān Muḥammad. Nazariyyat al-Naskh fī al-Sharā'i<sup>c</sup> al-Samāwiyya, pp. 42-75, 109 - 121 ff. cf. al-Jabrī, <sup>c</sup>Abd al-Muta<sup>c</sup>ālī. Lā naskha fī al-Qur'an, pp. 14 ff.

11. al-Insāf, p. 215.
  
12. The earliest sources are the Risāla of Shāfi<sup>c</sup>ī and Kitāb al-Amr wal-Nahy, ascribed to al-Muzanī (d.264/878), edited and translated by R. Brunschvig, Le Livre de l'ordre et de la defense, d'al-Muzani, Bulletin d'Etudes Orientales, Institut Francais de Damas, vol. XI, pp. 145 ff.; see also Schacht, Introduction to Islamic Law, pp. 266 ff. (hereafter, Intro.)
  
13. For the earliest works on this subject see Schacht's bibliography, *ibid.*, pp. 265 ff.
  
14. Qiyās cannot function without "<sup>c</sup>illa"; See Shāfi<sup>c</sup>ī Risāla, nos. 592-99, 1321-1456, 1480-1495, 1607-70; cf. Schacht, Origins, pp. 98 ff.; Wansbrough, QS, p.168. See also Fayrūzabādī, al-Tabsirat, pp. 436-37. For the attitude of the Ḥanābila towards the qiyās, see Ibn al-Ḥanbalī, <sup>c</sup>Abd al-Raḥmān al-Anṣārī. Agyisat al-nabīyy al-Muṣṭafā, pp. 100 ff. cf. pp. 76 ff.; cf. Ibn Ḥazm, Mulakhkhas Ibtāl al-qiyās wa al ra'y wa al-Istihsān wa al-taqlīd wa al-ta<sup>c</sup>līl, pp.5 ff.
  
15. See the works on Traditions under the appropriate heading. For Variant readings, see Wansbrough, QS, pp. 202-7. cf. Ibn al-Jazarī, al-Nashr fī qirā'āt al-<sup>c</sup>ashr, vol. 1, pp. 21 ff.
  
16. Hereafter Raf<sup>c</sup> al-malām.

17. Ibid., p. 4. cf. <sup>c</sup>Abd al-Majīd, al-Ittijāhāt al-fiqhiyyah, pp. 31-92, 105-112 and 185-331; al-Khinm, ikhtilāf, pp. 42-60, and 108 ff.
18. Raf<sup>c</sup> al-malām, pp. 4, 14, 15, 17, 18, 21, 25, 26, 29 respectively. Cf. al-Khinm, op.cit., pp. 244-261.
19. Raf<sup>c</sup> al-malām, pp. 6-12. But cf. Shafi<sup>c</sup>i's attitude towards naskh for the "Qur'ān" or "Sunna" versus "Qur'ān" or "Sunna", Risāla, nos. 311-345, 572-74; cf. 359-420, 601-603, 655-736, and 1113-1119.
20. Raf<sup>c</sup> al-malām, pp. 6-12.
21. The examples are:
- (I) Abū Bakr and the case of the inheritance of grandmother (p.6), appeared first in Ma. Farā'id: C.4 and 6; Han. vol. 5, p. 327; Daw. Farā'id: C.5; Tir. Farā'id: C. 10 and 11, Jah. Farā'id: C. 4; Dar. Farā'id: C. 19, 20, 21, 22, and 23.
- (II)<sup>c</sup>Umar and the manner of seeking permission to enter: al-Isti'dhān; See Han. vol. 3, pp. 6, 19, 221; vol. 4, pp. 343, 348, 400, 403, 410, 418; Bu. Isti'dhān: 13; Mu. Ādāb: H.32, 34, 35 and 37; Daw. Adab: 127, 130; Tir. Isti'dhān: 3; Jah. Adab: 17; Dar. Isti'dhān: 1.
- (III)<sup>c</sup>Umar and the case of a widow on inheriting the wergeld of her murdered husband. See Ma. Uqūl: 9;



- Daw. Farā'id: 18; Jah. Diyāt: 12, Farā'id: 8;  
Tir. Farā'id: 18, Diyāt: 18; Dar.Farā'id: 35.
- (IV) <sup>c</sup>Umar and the jizya of majūsī. Mā Zakāt: C.42.  
Han. vol. 1, pp. 190, 194; Daw. Kharāj: 29.  
 cf. Tay. H. 225; Ma. Zakāt: H.41; Bu. Jizya: 1;  
Daw. Kharāj: 19; Tir. Siyar: 31; Dar. Siyar: 57;  
Ibn Sa<sup>c</sup>d: vol. 1, section 2, p. 19.
- (V) <sup>c</sup>Umar and the case of plague in Syria see Han.  
 vol. 1, pp. 178, 180, 186; vol. 3, p. 416,  
 vol. 4, pp. 177, 186; vol. 5, pp. 206, 208, 210,  
 373. cf. vol. 4, pp. 195, 196; vol. 5, p. 248.  
Bu. Ṭibb: 30; Mu.Salām: 93, 94, 98, 100. cf. 92;  
 and Han. vol. 5, p. 202; vol. 1, p. 19; Tir.  
Janā'iz: 66.
- (VI) A dispute between <sup>c</sup>Umar and Ibn <sup>c</sup>Abāss over  
 uncertainty and certainty in the prayer. See  
Ma. Nidā': 61, 62, 63; Han. vol. 1, pp. 190, 193,  
 204, 205, 206, 379, 429, 438, 455; vol. 3,  
 pp. 72, 83, 84, 87; Bu. Ṣalāt: 31; Mu. Masājid:  
 88, 89; Daw. Salāt: 190, 191, 193; Jah. Iqāmat:  
 132, 133; Nas. Sahw: 24, 25.
- (VII) <sup>c</sup>Umar and the question of wind - rīḥ, see Tir.  
Da<sup>c</sup>awāt: 48; Jah. Nikāḥ: 27; Han. vol. 2, pp. 268,  
 409, 518; vol. 5, p. 123; Daw. Adab: 104;  
 cf. Jah. 29.
- (VIII) <sup>c</sup>Umar and the wergeld of fingers, see Han. vol. 1,

pp. 227, 339, 345; Bu. Diyāt: 20; Daw. Diyāt: 18; Jah. Diyāt: 18; Tir. Diyāt: 4; Nas. Qasāma: 45.

- (IX) <sup>U</sup>Umar and the question of performing oneself before and after stoning the <sup>Q</sup>aqaba during the ḥajj. See Ma. Hajj: 19; Han. vol. 6, pp. 39, 98, 107, 130, 162, 175, 181, 186, 192, 200, 207, 209, 214, 216, 237, 238, 344, 245, 254, 258; Bu. Ghusl: 12, 14; Hajj: 18, 143; Libās: 73, 74, 79, 81; Mu. Hajj: 31, 32, 33-38, 46-49; Daw. Manāsik: 10; Tir. Hajj: 77; Jah. 77; Nas. Manāsik: 41, 42, 97; Ghusl: 13, 25.
- (X) <sup>U</sup>Umar and the question of mash<sup>Q</sup> alā al-khuffayn, See Jah. Tahāra: 62; Tir. Tahāra: 71; Nas. Tahāra: 97.
- (XI) <sup>U</sup>Uthmān's dispute over the case of a widow in spending her waiting period - <sup>Q</sup>idda - in the house of her husband, See Ma. Talāq: 87; Daw. Talāq: 44; Jah. Talāq: 8; Tir. Talāq: 23; Nas. Talāq: 60; Dar. Talāq: 14; cf. Tir. Talāq: 25 and 19.
- (XII) <sup>U</sup>Uthmān and a gift of meat sent to him, see Han. vol. 1, p. 100. But cf. Han. vol. 1, p. 404 (Ajībū al-dā<sup>Q</sup>ī walā taruddū hadiyyatahu); and Jah. At<sup>Q</sup>ima: 27 (...walā uhdiya lahu laḥman qattu illā qabilahu).
- (XIII) <sup>Q</sup>Alī and the Ṣalāt al-Tawbat, Han. vol. 1, pp. 2, 9, 10; Daw. witr: 26; Jah. Iqāma: 193;

Tir. Ṣalāt: 181; Tafsīr sūrat 3, C.14.

(XIV) °Alī and Ibn °Abbas giving fatwā by which a pregnant widow has no choice but to take the longest period of °idda Ma.Ṭalāq: 69, Han. vol. 4, p. 108; Bu. Ṭalāq: 11; Nikāḥ: 36; Daw. Ṭalāq: 33.

(XV) °Alī, Zayd and Ibn °Abbās giving fatwā on the mufawwadat (i.e. a widow whose husband died before mentioning the amount of dowry. Has she the right to the inheritance?) See Tir. Nikāḥ: 42, H.1.; cf. al-Mubākfūri, Tuhfat al-ahwadhī, vol. 4, pp. 299-301.

22. Raf° al-malām, pp. 12, 410; and Ṣiḥḥat uṣūl madhhab ahl al-Madīna, pp. 24-6; cf. pp. 2 - 8.

23. Ibid., pp. 32 ff. cf. p. 31, L.9.

24. See p. 5 ff.

25. See p. 25 ff. cf. Ibn Ḥazm, al-Iḥkām, vol. 1, pp. 237 ff.

26. See Origins, pp. 1 - 180.

27. Ibid., pp. 170 ff. passim.

## NOTES TO CHAPTER 8

1. <sup>ʿ</sup>Ala' al-Dīn Abū Bakr b. Mas<sup>ʿ</sup>ūd called Malik al-<sup>ʿ</sup>Ulamā' (King of Scholars) died in Aleppo in 587/1189. See El, second edition, s.v. Kāsānī.
2. Abū Bakr Muḥammad b. <sup>ʿ</sup>Abd Allāh al-Ma<sup>ʿ</sup>āfirī, a traditionist belonging to Seville; b. 468/1076, d. 543/1148. See al-Dhahabī, Tadhkirat al-ḥuffāz, vol. 4, pp. 86-90; Ibn Ḥajar, Lisān al-mīzān, vol. 5, p. 234. cf. El, second ed. s.v. IBN AL-<sup>ʿ</sup>ARABī.
3. Abū al-Walīd Muḥammad b. Aḥmad called Ibn Rushd, theologian and philosopher. Born at Cordova in 520/1126 and died at Marrākush in 595/1198. See El, s.v. Ibn Rushd.
4. Ibrāhīm b. Ali b. Yūsuf al-Fīrūzābādī, born in Fīrūzābād in 393/1003 and died in Baghdād 476/1083. See Ibn al-Athīr, Kāmil, vol. 10, pp. 38, 71 and 81 f; and al-Subkī, Ṭabaqāt al-Shāfi<sup>ʿ</sup>iyya al-Kubrā, vol. 3, pp. 88-111, 275-280.
5. Yaḥyā b. Sharaf, Abū Zakariyyā', born 631/1233 in Nawā south of Damascus, and died in 676/1277. See Subki, op.cit., vol. 5, pp. 165-168. Cf. El, first edition, s.v. al-Nawawī.
6. Muwaffaq al-Dīn Abū Muḥammad <sup>ʿ</sup>Abd Allāh Ibn Qudāma

al-Maqdisī. Born near Jerusalem in Bayt al-Maqdis, in 541/1147 and died in Damascus in 620/1223. See El, second edition, s.v. Ibn Kudāma.

7. Dāwūd b. °Alī b. Khalaf al-Iṣfahānī, Abu Sulaymān, the imām of the school of the Zāhiriyya. He was born in Kūfa in 200-2/815-8 and died in Baghdād in 270/884. See Subkī, op.cit., vol.2, p. 42 ff; Ibn Kathīr, al-Bidāyat wal-Nhāya, vol. 11, p. 47 ff; cf. Goldiher, Die Zāhiriten p. 27 ff. passim.
8. Badā'i° al-Ṣanā'i°, vol. 7, pp. 33-34; cf. Sarakhsī, al-Mabsūt, vol. 9, p. 38 f.
9. al-Mabsūt, op.cit., p. 54 ff; Badā'i°, op.cit., p. 34 f; cf. Ibn Hazm, al-Muḥallā, vol. 11, pp. 227-231.
10. al-Mabsūt, op.cit.
11. See Ibn Khallikān, Wāfayāt al-A°yān, vol. 2, entry 243, pp. 317-19; Ziriklī, al-A°lām, vol. 3, p. 78.
12. al-Mabsūt, op.cit., p. 54 ff.
13. Ibid., see also Badā'i°, op.cit., p. 34 f.
14. Mudawwana, vol. 16, pp. 41-42.
15. See Tahdhīb, vol. 6, entry 500, pp. 252 ff; and Ibn Farḥūn, al-Dībāj al-Mudhahhab, vol 1, pp. 455-68.

16. Mudawwana, op.cit.
17. Ibid. But cf. Badā'i<sup>c</sup>, op.cit.
18. Mudawwana, op.cit. Cf. Awa, Moḥammad el. "Ta<sup>c</sup>zīr in the Islamic penal system" J. Isl. Comp. Law 6 (1976), pp. 41-59.
19. Asnā al-Matālib, vol. 2, p. 128; but cf. Sarakhsī, al-Mabsūt, op.cit., p. 54.
20. See Tay. H. 90; Han. vol. 6, pp. 100, 101, 144; Bu. Ḥudūd: C.22; Talāq: C.11; Daw. Ḥudūd: C. 17; Jah. Talāq: C.15; Dar.Ḥudūd: C.1; Tir. Ḥudūd: C.1; Nas. Talāq: C.21; Daraq. Ḥudud: H.173; Hak. Buyū<sup>c</sup>: vol. 2, p. 55. Cf. Wensinck, Handbook, s.v. punishment, p. 200 f.
21. al-Mabsūt, op.cit., p. 55, L.5; cf. Badā'i<sup>c</sup>, op.cit., p. 34, L.7.
22. al-Mabsūt, op.cit., L. 19; cf. Abū Yūsuf, Kharāj, p. 90 f; see also Schacht, Origins, pp. 180, 235, 285.
23. al-Mabsūt, op.cit.
24. To give, but one, example a musta'jarat, that is a woman hired for zinā (i.e. a prostitute) is not punishable by the ḥadd as far as Abū Ḥanīfa is concerned; because the money paid to her resembles mahr (dowry).

and hence there is shubha. See Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 250 ff. For the maxim cited above see Kharāj, p. 90 f. cf. Schacht, Origins, p. 184 and notes 3-4; pp. 235 and 285. See also Sarakhsī, al-Mabsūt, vol. 9, p. 58.

25. Kharāj, op.cit. cf. Khuwarazmī, Masānīd al-Imām, vol. 2, p. 214.
26. Ibid., and Masā'il al-Shaybānī, Dār al-Kutub, MS, No. B.20331, fol. 151; al-Āthār, Dār al-Kutub, MS, No. M104, Ḥadīth, fol. 89.
27. Mudawwana, vol. 16, p. 36.
28. See Umm, vol. 7, pp. 150, 314.
29. Ibid., vol. 6, p. 144.
30. Ibid., vol. 7, p. 129.
31. Aḥkām al-Sultāniyya, p. 225.
32. al-Muḥallā, vol. 11, p. 153 f.
33. See Daw. Salāt: 114; Tir. Hudūd: 2; cf. Han. vol. 6, p. 181; Daw. Hudūd: 5; and Jah. Hudūd: 5. See also Tirmidhī's commentary on the ḥadīth in question. Hudūd: C.1, H.1; cf. Ibn 'Arabi's attitude, Sharḥ Ibn 'Arabī,

vol. 6, p. 198; and al-Albānī, Da'īf al-Jāmi', vol. 1, H. 258, p. 117. cf. H. 259-61, p. 118.

34. See Jāmi' al-Saghīr, on the margin of the Kharāj, p. 66.

35. See Umm, vol. 7, pp. 167-9; cf. vol. 5, pp. 83, 156, 136; Tahāwī, Ikhtilāf, p. 158; Māwardī, Ahkām al-Sultāniyya, p. 223; Kāsānī, Badā'i', vol. 7, p. 43 and Ibn al-Humām, Fath al-Qadir, vol. 4, p. 150.

36. Ibid. cf. Sarakhsī, al-Mabsūṭ, op. cit., pp. 77 ff.  
Cf. Umm, vol. 7, p. 51 passim and Ibn Ḥazm, op. cit., pp. 380 ff.

37. al-Mabsūṭ, op. cit., Badā'i', op. cit., p. 34, L. 17.

38. Ibid. On page 79, Sarakhsī refers to profane usage by quoting a broken verse, probably of his own, to show that the existence of two different names, each for a particular vice, is a proof that sodomy is not adultery.

من يد ذات حرفي زنى ذكر لها محبان لوطي وزنا

From a hand of a free-woman, in the garment of male; she has two lovers a sodomite (lūṭiyyun) and an adultorver (wa zannā'u).

39. Apparently, different punishments for sodomy have been given a stamp of approval as an authoratative decision by a particular Companion - sometimes as a Prophetical ḥadīth and other times as a personal opinion of a given Companion. See Ibn Ḥazm, al-Muhallā, vol. 11, pp. 380-386.



- and al-Iḥkām, vol. 2, p. 709 f.
40. See also Ṭahāwī, Ikhtilāf, p. 158; cf. Zurgānī, vol. 8, p. 75; Asnā al-Maṭālib, vol. 4, p. 336 and Kāsānī, op. cit., vol. 7, p. 34.
41. Sarakhsī, op.cit., p. 77, L. 22.
42. See below, p. 232 f.
43. Cf. Schacht, Intro. p. 178 passim.
44. Muwatta', Hudūd: C.1. H.11. See Chap. 11 below for muḥṣan.
45. Mudawwana, vol. 16, p. 54.
46. Ibid. Cf. Ṭabari, Jāmi<sup>c</sup> al-bayān, for sūra, 27.54, 4.16 and 7.81.
47. Umm, vol. 7, p. 169; cf. p.51; and vol. 5, p. 84.
48. Ibid., vol. 7, p. 169, L.31.
49. Ibid., vol. 5, p. 84; vol. 7, p. 51, passim.
50. Ibid., vol. 5, p. 156, cf. p. 84.
51. Han. vol. 3, p. 382. Jah. Hudūd: 12. H.3, Tir. Hudūd: 24, H.3.

52. Han. vol. 1, pp. 217, 225, 227, 237, 254, 339, 365;  
vol. 2, pp. 91, 287; Tir. Hudūd: 24, H.2;  
cf. "mukhannath" Bu. Libās: 62; Hudūd: 33; Daw.  
Adab: 53; Dar. Isti'dhān: 21.
53. Han. vol. 1, p. 279; Daw. Hudūd: 28; Jah. Hudūd:  
12, H.1; Tir. Hudūd: 24, H.1; cf. Ṭahāwī, Ikhtilāf,  
p. 158; and Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 380-86.
54. Daw. Hudūd: 29, H.2; Jah. Hudūd: 12, H.2.
55. Bay. Hudūd: vol. 8, p. 223, cf. Ibn Qudama, al-Mughnī,  
vol. 9, p. 61 f.
56. Umm, vol. 5, p. 156, L.20.
57. Tir. Radā<sup>c</sup>: 12, Dar. Nikāḥ: 30.
58. Tir. Ṭahāra: 102, Jah. Ṭahāra: 122. The same ḥadīth  
appears in the Musnad of <sup>c</sup>Alī al-Ja<sup>c</sup>dī as an opinion of  
<sup>c</sup>Abd Allah (b. Mas<sup>c</sup>ūd?). Musnad al-Ja<sup>c</sup>dī, Dār al-Kutub,  
MS, no. 2240 vol.8, fol. 250-51; However, Ishāq b. Rāhweh  
knows it as a prophetic ḥadīth. Musnad Rāhweh,  
Dār al-Kutub, MS, no. 454, fol. 63. Cf. Tir. Ṭahāra:  
102 (He who had sex with his wife during her menstruation  
period, let him give a dīnār in alms).
59. Daw. Nikāḥ: 45.
60. al-Mughnī, vol. 9, p. 60 f.

61. Ibid.
62. Tir. Hudūd: 24. cf. Tahdhīb, vol. 5, entry 72,  
pp. 51-2, and al-Dhahabī, al-Mughnī, vol. 1, entry 2989,  
p. 321.
63. Tir. op.cit.; cf. Bay. vol. 8, pp. 220 ff.
64. See Kāsānī, Badā'i<sup>c</sup>, vol. 7, pp. 34 ff.
65. See Awa, Moḥammad el "Ta<sup>c</sup>zīr in the Islamic penal  
system". J. Is. Comp. Law 6 (1976), pp. 4-59; Amir, A  
al-Ta<sup>c</sup>zīr fī al-Sharī'at al-Islāmiyya, pp. 465 ff;  
But cf. Muwatta', Jihād: "...wa arā dhālīka lil-Imām),  
C. 10, H.3 and C.11, H.1.
66. See Dasūqī, Sharḥ al-Kabīr, vol. 4, pp. 314 ff.
67. See Mughnī al-Muhtāj, v l. 4, pp. 145 ff and Nihāyat  
al-Muhtāj, vol. 7, pp. 405 ff.
68. Mughnī al-Muhtāj, op.cit.
69. al-Mughnī, vol. 10, pp. 152 ff.
70. Badā'i<sup>c</sup>, vol. 7, pp. 34 ff. cf. Sarakhsī al-Mabsūt,
71. Umm, vol. 5, pp. 84-85, L.30 passim.

72. Mukhtaṣar al-Muzanī, on the margin of the Umm, vol. 5, p. 167.
73. See Ibn Ḥazm, al-Muḥallā, vol. 11, p. 386 ff.
74. al-Mughnī, vol. 4, p. 145; vol. 9, pp. 62 ff.
75. Ibid., p. 62, L. 17.
76. Tir. Ḥudūd: 23, Cf. Daw. Ḥudūd: 30, H.1. (4464);  
cf. Khaṭābī, Ma<sup>c</sup>ālīm al-Sunan, vol. 4, p. 609.
77. However, he transmits a different ḥadīth going back to  
Ibn <sup>c</sup>Abbās on the authority of Sufyān al-Thawrī, in which  
the offender will not be punished by a ḥadd. Tirmidhī  
says: "This ḥadīth is more authentic than the first one".  
See also Sharḥ Ibn <sup>c</sup>Arabī, vol. 6, p. 238 f; and  
al-Mubākfūrī, Tuhfat al-aḥwadhī, vol. 5, p. 19 f.
78. Han. vol. 1, p. 217.
79. Daw. Ḥudūd: 30, H.2. (4465); Tir. Ḥudūd: 23, H.2.  
cf. Mubākfūrī, op.cit., p. 201 and Mudawwana, vol. 16,  
p. 14, L.7.
80. Tir. op.cit.
81. Ṭaḥāwī, Ikhtilāf, pp. 145 ff; cf. Sarakhsī, al-Mabsūt,  
vol. 9, pp. 54, 56; Kāsānī, Badā'i<sup>c</sup>, vol. 7, pp. 33 ff.

82. Kharāj, p. 101; but cf. Ṭahāwī, op.cit., L. 9.
83. Muwattā', Hudūd: C. 4, H.1. cf. Dasūqī, Hāshiyat al-Dasūqī, vol. 4, p. 319 f.
84. Muwattā', op.cit C.3, H.2.
85. See Ṭahāwī, Ikhtilāf, p. 154.
86. Strangely enough, the ḥadīth does not appear in the Musnad of Ibn Ḥanbal. It makes it debut during the classical period onwards. Bu. Bad' al-Wahy: 1; Itq: 6; Manāqib al-Anṣārī: 45; Ṭalāq: 11 (Rubric); Aymān: 23; Ikrāh: (Rubric); Ḥiyāl: 1; Mu. Imāra: 155; Daw. Ṭalāq: 11; Jah. Zuhd: 26; Nas. Ṭahāra: 59; Ṭalāq: 24; Aymān: 19; cf. Goldziher, Muslim Studies, vol. 2, p. 167 f.
87. But cf. Fath, vol. 15, pp. 324-47.
88. Bu. Ikrāh: C. 6.
89. Han. vol. 4, p. 318; Jah. Hudūd: 30; Tir. Hudūd: 22; cf. "La<sup>c</sup>allaki istukrihti" Han. vol. 1, pp. 140, 141, and 153.
90. Tir. Hudūd: 22, H.2. cf. H.1. See Mubākfūrī, Tuhfat al-ahwadhī, vol. 5, pp. 15-18; cf. Ibn <sup>c</sup>Arabī, vol. 6, pp. 234-38.

91. Jah. Talāq: 16.
92. Ibn Qudāma, al-Mughnī, vol. 7, p. 59.
93. Ibid., p. 60. cf. Ibn Qayyim, Turuq al-hikmiyya, p. 53 f.
94. See Kharāj, p. 109; Shaybāni, Siyar al-Kabīr, vol. 4, p. 107; Umm, vol. 7, p. 80; cf. Schacht, Origins, p.209, Wansbrough, "Safe Conduct" BSOAS (1971), p. 34 and n.65.
95. Kharāj, op.cit.
96. Umm, vol. 7, p. 322, L. 19. But cf. Tir. Hudud: C.20, H.1.
97. Umm, op.cit.; see also al-Radd <sup>C</sup>alā siyar al-Awzā<sup>C</sup>i pp. 80 ff.
98. Origins, p. 209 and n. 8.
99. cf. Muwatta, Jihād: C. 10, H.2; C.11, H.1. passim.
100. Umm, vol. 7, pp. 322-3. The point which Shāfi<sup>C</sup>i tries to demonstrate in the last remark, is that Makhūl had never met Zayd b. Thābit. See Abū Yūsuf, al-Radd <sup>C</sup>alā siyar al-Awzā<sup>C</sup>i, p. 82, n.1.
101. Origins, p. 209; see also n. 6-8; Abū Yūsuf, al-Radd <sup>C</sup>alā siyar al-Awzā<sup>C</sup>i, p. 82, n.1. If this is Schacht's source then it must be pointed out that the ḥadīth in

question, which is ascribed to Shaybānī, is about a Muslim culprit who committed a crime in enemy territory, whereby he managed to obtain asylum (amān), i.e. saved from extradition. cf. Han. vol. 4, p. 360 - with reference to slaves.

102. cf. Schacht, Origins, p. 209.

103. or "Hands should not be cut off during a raid".

Tir. Hudūd: 20, H.1; Daw. Hudūd: C.18, H.1; but cf. Khaṭabī, Ma<sup>c</sup>ālīm al-Sunan, vol. 4, p. 563 f.

104. Nevertheless, the isnād of Abū Dāwūd for the same ḥadīth is unmistakably Egyptian, revealing, for me, the concern of the Egyptian jurists over similar problem in that region. The Muslim expedition forces in North Africa are probably the impetus for such ḥadīths. For the biography of Abū Dāwūd's transmitters see: (Aḥmad b. Ṣāliḥ, d. 248); Tahdhīb, vol. 1, entry 68, pp. 39-42; (Ibn Wahb. Tahdhīb, vol. 6, entry 140, pp. 71-74); (Ḥaywat b. Shurayḥ d. 158), Tahdhīb, vol. 3, entry 135, pp. 69-70; (Ayyāsh b. Abbās, d. 133), Tahdhīb, vol. 8, entry 361, pp. 197-98; (Shuyaym b. Bītān, d. ?), Tahdhīb, vol. 4, entry 637, p. 379; (Yazīd b. Ṣubḥ, d. ?), Tahdhīb, vol. 11, entry 646, p.338.

105. See Kharāj, p. 109; See also Ikhtilāf Abi Ḥanīfa wa Ibn Abī Laylā, pp. 166 f; and 222. cf. Sarakhsī, al-Mabsūt, vol. 9, pp. 101 ff.

106. Origins, pp. 209-8.
107. Han. vol. 3, p. 434; Daw. Hudūd: 37; Jah. Hudūd: 31;  
Masājīd: 5; Dar. Diyāt: 2; Tir. Diyāt: 9.
108. Jah. Hudūd: 31, H.2.
109. Daw. Hudūd: 38, H.1. (4490) and Ibn Qudāma, al-Mughnī,  
vol. 7, p. 169 f. and Ibn Ḥazm, al-Muḥallā, vol. 11,  
p. 123.
110. cf. Umm, vol. 7, p. 38; vol. 6, p. 124 ff; and  
Mukhtaṣar al-Muzanī, on the margin of Umm, vol. 5,  
p. 203 ff. cf. vol. 7, pp. 325-26.
111. See Kāsānī, Badā'i<sup>c</sup>, vol. 7, p. 35. Sarākhsī, al-Mabsūt,  
vol. 9, p. 55; but cf. Ibn Ḥazm, al-Muḥallā, vol. 11,  
pp. 158 ff.
112. Abū Yūsuf, Ikhtilāf, pp. 220 f; cf. Sarākhsī, al-Mabsūt,  
vol. 9, p. 39 f.
113. Mudawwana, vol. 16, p. 55; cf. p. 42, L.5. Dasūqī,  
vol. 4, p. 316; Ibn Farḥūn, Tabṣirat al-ḥukkām, vol. 2,  
p. 232.
114. See Tahdhīb, vol. 3, entry 491, p. 258 f. cf. Ibn  
Khalīkān, Wafayat al A'yān, vol. 2, entry 232, pp. 288-90.



115. al-Muḥallā, op.cit., p. 159.
116. Umm, vol. 7, pp. 325-6, passim.
117. Kharāj, p. 98; see also Ikhtilāf Abī Ḥanīfa, p. 221
118. Muwattā' al-Imām, H. 694, p. 242.
119. A number of hypothetical cases, each with a suitable prophetical ḥadīth, were assumed. Among them are:  
A man with a fifth wife (see Ibn Ḥazm, al-Muḥallā, vol. 11, p. 246 f); A man with his stepmother (Ibid., pp. 252 ff); A man with a slave girl belonging to his wife (Ibid., p. 257 f); see n. 122 below.
120. See Mudawwana, vol. 16, pp. 2 ff; Sarakhsī, al-Mabsūt, vol. 9, p. 101 ff; Kāsānī, Bada'i<sup>c</sup>, vol. 7, pp. 42 ff; Māwardī, Aḥkām al-Sultāniyya, p. 1213 ff. Ibn Qudāma, al-Mughnī, vol. 9, pp. 54 ff; Ibn Ḥazm al-Muḥallā, vol. 11, pp. 305 ff; cf. A.A. Maṣṣūr, Nizām al-Tajrīm wal-<sup>c</sup>Iqāb fil-Islām, pp. 184-186.
121. Jah. Ḥudūd: 5.
122. Han. vol. 2, pp. 179, 204 and 214.  
Other hypothetical cases are:  
I. A man who fornicated with his sister (i.e. incest):  
See Bu. Ḥudūd: 21;  
II. A man + a slave girl belonging to his mother:

Daw. Hudūd: 27; Jah. Hudūd: 8. Tir. Hudūd: 21,  
Nas. Hudūd: 70 and Dar. Hudūd: 20.

III. A man + bereaved stepmother:

Dar. Farā'id: 45.

IV. A slave who got married without his/her  
master's permission:

Jah. Nikāh: 43 and Dār. Nikāh: 40.

For more hypothetical cases, with or without ḥadith,  
see Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 252-59;  
cf. pp. 242-48.

123. Sarakhsi, op.cit., p. 37 f; cf. Kāsānī, op.cit., pp.33 ff.

124. cf. Dasūqī, op.cit., vol. 4, pp. 313 ff.

125. cf. Mughnī al-Muḥtāj, vol. 4, pp. 144 ff.

126. cf. Ibn Qudāma, op.cit., vol. 9, pp. 54 ff.

127. See al-Mabsūt, vol. 9, pp. 38 ff; al-Khaṭīb al-Sharbīnī,  
Mughnī al-Muḥtāj, vol. 4, p. 132 f; al-Ramlī, Nihāyat  
al-Muḥtāj, vol. 7, pp. 128 ff; al-Dasūqī, Hāshiyat al-  
Dasūqī, vol. 4, pp. 313 ff; al-Kharashī, Muḥammad.  
Sharḥ al-Mukhtaṣar, vol. 5, pp. 316 ff; al-Anṣārī,  
Zakariyā'. Ghurār al-bahiyya, sharḥ bahjat al-wurdiyya,  
vol. 5, pp. 81 f; Ibn Ḥazm, al-Muḥallā, vol. 11,  
pp. 229 ff; Ibn al-Humām, Fath al-Qadīr, vol. 5,  
pp. 30 ff. Ibn Nujaym, al-Baḥr al-rā'iq, vol. 5,  
pp. 2 ff.

128. Vol. 1, p. 336, L.3 and 8; Cf. Wansbrough, QS, pp. 38-43; cf. pp. 46-7.
129. He lived and indeed experienced the mihna. See El, s.v. Ibn Hanbal; and Patton, W.M. Ahmad Ibn Hanbal and the Mihna, pp. 49-111; cf. pp. 190 ff.
130. But cf. Mu. Hudūd: H.22 (fīmā uṭahhiruka?).
131. See Ibn Hazm, al-Muḥallā, vol. 11, pp. 380-85; cf. pp. 390 ff.
132. See El, second edition, s.v. Hadd.
133. Ibn Majah, Hudud.

## NOTES TO CHAPTER 9

1. Strictly speaking, a fourth category, known as Li<sup>c</sup>ān: a formal procedure to disown one's wife's child, is not considered by the fuqahā' to be among the means of establishing zinā accusation: See Coulson, A History of Islamic Law, p. 176 ff; Schacht, Introduction, pp. 165 ff; and 179. cf. El, first edition, s.v., Li<sup>c</sup>ān, cf. Ibn Qayyim, Turuq al-ḥikmiyya, pp. 163 ff.; and Shāfi<sup>c</sup>i, Umm, vol. 5, pp. 110 ff.
2. Cf. Mālik's view on the subject, Muwattā, Hudūd: C.4;
3. See Schacht, Introduction, p. 195.
4. See Umm, vol. 6, p. 122 f, passim; vol. 7, p. 51. Ṭahāwī, Ikhtilāf, pp. 20 ff, 217 f. Ibn Qudāma, al-Mughnī, vol. 10, pp. 214 ff. cf. Schacht, Origins, Tr. 228, p. 274.
5. See Ibid., p. 227; Umm, vol. 7, pp. 40 ff; cf. p.80 ff. Ibn Rushd, Bidāyat al-Mujtahid, vol. 2, pp. 439 ff. cf. Schacht, Origins, Tr. 114, p. 300.
6. See Sarakhsī, al-Mabsūt, vol. 9, p. 97 ff; cf. p.69 f. Ibn Ḥazm, al-Muḥallā, vol. 9, p. 420 ff. and vol. 11, pp. 144 ff.

7. See Tahdhīb, vol. 4, entry 564, pp. 326;28; vol. 5, entry 546, pp. 319-21; vol. 11, entry 655, p. 342 f; vol. 12, entry 154, pp. 38-40; and vol. 3, entry 491, p. 258-9 respectively.
  
8. See Mudawwana, vol. 13, pp. 13 ff; cf. Ṭahāwī, Ikhtilāf, pp. 183, 189; Ibn Ḥazm, al-Muḥallā, vol. 9, pp. 420 ff.
  
9. Mudawwana, ibid.
  
10. Ṭahāwī however, reports that some of the Khawārij in Kufa forced Ibn Abi Laylā to accept the evidence of slaves which he did. Ikhtilāf p. 187 f.
  
11. Ṭahāwī, op cit.
  
12. Mudawwana, op.cit.
  
13. cf. Ibn Ḥazm, op.cit.
  
14. Umm, vol. 7, pp. 41 ff; and 81 f; cf. Schacht, Origins, p. 218.
  
15. Umm, op.cit., cf. Schacht, Origins, pp. 147, 210 f.
  
16. Umm, op.cit., pp. 40 ff.; cf. Abū Yūsuf, Ikhtilāf Abi Ḥanīfa, p. 73 f; Sarakhsī, al-Mabsūt, vol. 9, pp. 182 ff; and vol. 16, p. 133 f.
  
17. Kharāj, p. 106 f; cf. Umm, vol. 4, p. 176. See also, Bu. Shahādāt: 18, H.1; Tir. Ahkām: 24, H.1.; Jihād: 30, H.1.; cf. Nikāḥ: 19; and Jah. Hudūd: 4, H.1.

18. Kharāj, op.cit. Cf. Wansbrough's suggestion for the possible implication of such a statement, SM, p. 72 ff. See also Lapidus, I.M. "Adulthood in Islam: religious maturity in the Islamic tradition". Daedalus 105 ii (1976), pp. 93-107.
  
19. See Ibn Ḥajar, Fath, vol. 6, pp. 190 ff. cf. Schacht, Introduction to Islamic Law, p. 193.
  
20. See Ṭaḥāwī, Ikhtilāf, p. 152 f; and Sarakhsī, al-Mabsūṭ, vol. 9, pp. 97 f; cf. Shāfi<sup>c</sup>i, Umm, col. 7, p. 113, L.5, and p. 114, L.11.
  
21. See Umm, vol. 7, p. 42 f; Ṭaḥāwī, Ikhtilāf, p. 188 f; Sarakhsī, al-Mabsūṭ, vol. 9, pp. 97 ff. Ibn Qudāma, al-Mughnī, vol. 10, pp. 171 f; and Ibn Ḥazm, al-Muḥallā,
  
22. Sarakhsī, op.cit.
  
23. Mudawwana, vol. 13, pp. 4 ff. cf. Ṭaḥāwī, op.cit.
  
24. Mudawwana, ibid., cf. Ṭaḥāwī, Ikhtilāf, p. 192 f. and Ibn Qudama, al-Mughnī, vol. 10, pp. 164 ff. Shu<sup>c</sup>ba (authority of Kūfa) knew no authority on this subject other than that of al-Ḥakam al-Kindī (see Tahdhīb, vol. 2, entry 756, p. 432-4) Musnd al-Ja<sup>c</sup>dī, MS, Dār al-Kutub, no. 2240, fol. 22, L. 14.
  
25. Mudawwana, ibid. Ṭaḥāwī, op.cit., p. 196; Ibn Ḥazm, al-Muḥallā, vol. 9, pp. 433 ff.

26. Umm, vol. 7, pp. 42 ff, 82 f; see also Ṭaḥāwī, op.cit., p. 188.
27. Ibn Qudama, op.cit., p. 144 f.
28. Ikhtilāf, p. 188 cf. p. 187, L. 20.
29. Ibn al-Qayyim, Turuq al-Hikmiyya, pp. 159, 171-4.
30. See Umm, vol. 7, pp. 116 f. Abū Yūsuf, Āthār, p. 166 and Ṭaḥāwī, Ikhtilāf, p. 191 f.
31. Turuq al-Hikmiyya, op.cit.
32. Ibid., pp. 157, 163.
33. Cf. Jah. Shahādāt: 4, H.1. Dāraq. Aqḍiya: p. 529; cf. Zayla<sup>c</sup>ī, Naṣb al-Rāya, vol. 3, p. 83 and n.2.
34. Jah. Shahādāt: 7, H.1. cf. Zayla<sup>c</sup>i, op.cit., p. 85 and n.1. and Daw. Hudūd: C.26, H.7, 8 and 9 (4452-54); and Zayla<sup>c</sup>i, Naṣb al-Rāya, vol. 4, pp. 85 ff.
35. Tir. Shahādāt: C.1, H.3; see also Sharḥ Ibn <sup>c</sup>Arabī, vol. 9, p. 171 f; Mubākfurī, Tuḥfat al-ahwadhī, vol. 6, pp. 580 ff. cf. Husain, Syed Mu<sup>c</sup>azzam. "Effect of Tauba (repentence) on penalty in Islam". Is. Stud. 8 (1969), pp. 189-198.
36. Umm, vol. 7, p. 81 f.

37. See Ṭaḥāwī, Ikhtilāf, p. 178; Zayla<sup>c</sup>i, Naṣb al-Raya, vol. 4, pp. 81 ff.
  
38. Ṭaḥāwī, Ikhtilāf, pp. 227; cf. Ibn Rushd, Bidāyat al-Mujlahid, vol. 2, pp. 465 ff.
  
39. Han. vol. 2, p. 465; Umm, vol. 6, pp. 122 f. (see below, p. 170). For the ḥadith of Hilāl, see:  
Bu. Shahādāt: 21, Tafsīr sūrat 24: C.3;  
Daw. Ṭalāq: 27, Jah. Ṭalāq: 27; Tir. Tafsīr  
Sūrat 24, C.3. cf. Zayla<sup>c</sup>i, op.cit., pp. 83 ff.
  
40. cf. Umm, col. 7, pp. 41 ff.
  
41. The actual verse, however, does not occur in Ibn Ishāq's version. Nevertheless, it is not impossible that by the time of Abū Ḥanīfa the verse was probably known to be associated with the Ḥadīth al-Ifk. Cf. Ibn Hishām, Sīra, vol. 2, H. 297 ff. Cf. Wansbrough's analysis of the content, SM, pp. 76-9, cf. p. 84 f. and 140.
  
42. See El, first edition, s.v. Ḳadhif; Schacht, Introduction, p. 179 f; and N.J. Coulson, A History of Islamic Law, pp. 13, 26, and 124.
  
43. The actual phrase employed by the Ḥadīth al-Ifk is "faqāla ahl al-ifk mā qālu"; Sīra, vol. 2, p. 298. L.18; "fa akhbaratnī bi-alladhī kāna min qawl ahl-ifk", p. 299, L. 19. "In kunti qarafti sū'an..." p. 301, L. 15; "...wa kānu mimman afṣaḥ al-fāhisha..." p. 302, L.17.



44. Sarakhsi, al-Mabsūt, vol. 9, pp. 102, 112, 115-6;  
Ibn Ḥazm, al-Muḥallā, vol. 11, p. 273 f. but cf.  
Ibn Qudāma, al-Mughnī, vol. 9, p. 84.
45. Kharāj, p. 97-8. Cf. Daw. Ḥudūd: 25 and 65.
46. Vol. 1, pp. 564-66.
47. Tabarī, on sūrat 5; Cf. Shāfi<sup>c</sup>i using the anecdote,  
Mukhtaṣar al-Muzani, on the margin of Umm, vol. 5, p. 167.
48. Umm, vol. 6, pp. 123 ff, passim.
49. Ibid., vol. 7, pp. 40 ff, passim. Mālik, quotes  
Q: 24, 4, 5 but not as the proof for 4 witnesses, rather  
for the acceptance of the evidence of the maḥdūd fī  
al-qadhf. See Muwatta', Aqdiya: C.3.
50. See Tabarī, sūrat 24.2. cf. Burton, CQ, pp. 72 ff.
51. Aḥkām al-Qur'ān, vol. 3, p. 10 f. cf. Ibn Kathīr  
(d. 774) on sūrat 4.15; and the so-called: Tafsīr Sufyān  
al-Thawrī, p. 182 f.
52. Shaybānī, Jamī<sup>c</sup> al-Saghīr, on the margin of the Kharāj,  
pp. 66 ff; See also Kharāj, pp. 98 ff. Umm, vol. 7,  
p. 43 ff; Mukhtaṣar al-Kharqī, topic 7193 (al-Mughnī,  
vol. 9, p. 69) cf. pp. 34 ff.

53. Kharāj, p. 99 ff, Mudawwana, vol. 13, pp. 12 ff;  
cf. Ibn Ḥazm, al-Muḥallā, vol. 9, pp. 395 ff. especially  
p. 403 f.
54. See Muwattā, (Book 37, C.7). Mudawwana, op.cit. The  
word debts is associated with Q.2.282. See Zayla<sup>c</sup>i,  
Naṣb al-Rāya, vol. 4, pp. 80 ff; cf. p. 89 f.
55. Mudawwana, op.cit.; cf. Zayla<sup>c</sup>i, op.cit., p. 80.
56. Mudawwana, op.cit.
57. See Umm, vol. 7, pp. 43, 75.
58. Ibid., p. 77 ff. cf. Ibn Ḥazm, op.cit., pp. 396 ff.
59. Ibid., p. 398; Umm, op.cit. cf. p. 77.
60. Ibid. L. 9.
61. al-Mughnī, vol. 10, p. 130. See also Ibn Ḥazm, op.cit.,  
pp. 398 ff.
62. al-Mughnī, vol. p, p. 69 f.
63. al-Muḥallā, vol. 9, p. 395 ff.
64. See Kharāj, pp. 135 ff; Āṭḥār, H. 740, p. 162; Umm, vol. 7,  
p. 43 passim; Mudawwana, vol. 16, pp. 39 ff. But cf.

Ibn Ḥazm, op.cit., pp. 412-15.

65. Umm, vol. 7, pp. 80-81 passim.
66. See Ibn Qudama, al-Mughnī, vol. 10, pp. 175 ff.
67. Bu. Shahādāt: (Rubric: Bāb Shahādāt al-'imā' wa al-<sup>c</sup>abīd).  
cf. Fath, vol. 6, pp. 195 ff.
68. See Sarakhsī, al-Mabsūt, vol. 9, p. 66; vol. 16, p. 95 f;  
cf. A. Yūsuf, Āthār, p. 162; Shaybānī, Jāmi<sup>c</sup> al-Saghir,  
on the margin of Kharāj, p. 93; and Umm, vol. 7, pp. 46 ff.
69. A. Yusuf, Athār, p. 162, no. 743; Ikhtilāf Abī Ḥanifa,  
pp. 158 ff; Ibn al-Humām, Sharḥ Fath al-Qadīr, vol. 4,  
pp. 171 ff. cf. Schacht, Origins, p. 188, and 291.
70. cf. Sarakhsi, op.cit., vol. 9, p. 66 and vol. 16, p. 101.
71. Mudawwana, vol. 13, pp. 9 ff; vol. 16, pp. 40-45;  
al-Ḥaṭṭab, Muhammad b. Muhammad. Mawāhib al-jalīl  
sharḥ Mukhtaṣar al-Khalīl, vol. 6, pp. 198 ff; and  
Zurqānī, Sharḥ al-Zurqānī, vol. 7, p. 195 f.
72. Umm, op.cit., al-Muhadhdhab, vol. 2, p. 355.
73. Ibid., al-Iqnā<sup>c</sup>, vol. 4, pp. 443 ff. cf. Abū Yūsuf,  
Ikhtilāf, op.cit.

74. Sarakhsi, op.cit., vol. 9, pp. 61-69; cf. al-Mudawwana, vol. 16, pp. 44 ff.
75. See Sarakhsi, op.cit., vol. 9, pp. 61, 68; cf. vol. 16, p. 103; Zayla<sup>c</sup>i, Naṣb al-Rāya, vol. 3, pp. 345 ff; and Ibn Hazm, op.cit., vol. 11, pp. 259-62.
76. Ibid., Sarakhsi, op.cit., vol. 9, p. 30 ff; Tahāwī, Sharḥ al-Āthār, vol. 2, p. 287.
77. Zayla<sup>c</sup>i, op.cit., n.l.
78. Umm, vol. 6, p. 123 cf. p. 214.
79. See Haythamī, Majma<sup>c</sup> al-Zawā'id, vol. 6, p. 263; al-Hākim, al-Mustadrak, Manāqib: vol. 3, p. 448. cf. Balādhurī, Futūḥ al-Buldān, vol. 4, p. 480 ff.
80. See Kharāj, p. 135 ff; Umm, vol. 6, pp. 207-16; Mudawwana, vol. 16, pp. 11-50; Sarakhsi, op.cit., vol. 16, pp. 129-32; Ibn Qudāma, al-Mughnī, vol. 12, pp. 32 ff; Ibn Hazm, al-Muḥallā, vol. 9, p. 393 ff; al-Anṣārī, al-Muḥadhdhab, vol. 2, pp. 343 ff; al-Haṭṭābi, Mawāhib al-Jalīl, vol. 6, p. 150 ff; and al-Khaṭīb al-Sharbīnī, al-Iqnā<sup>c</sup>, vol. 2, p. 437.
81. A. Yusuf, Āthār, p. 162 f; Shaybānī, Āthār, p. 12 f. Umm, vol. 6, p. 214, vol. 7, pp. 41, 82.

82. Muwatta, Aqdiya: 3; Mudawwana, vol. 13, pp. 3 ff;  
vol. 16, pp. 58 ff; cf. Umm, op.cit.
83. Umm, vol. 7, pp. 41 f, 82; cf. Ibn Ḥazm, al-Iḥkam,  
vol. 1, pp. 402-153.
84. cf. Sarakhsī, al-Mabsūt, vol. 9, pp. 70, 74; vol. 17,  
p. 9.
85. Umm, op.cit., p. 41 f; cf. A. Yūsuf, Āthār, p. 162 f;  
and Ibn Ḥazm, op.cit., vol. 9, pp. 431-33; and al-Iḥkām,  
vol. 1, p. 408 and vol. 2, p. 1141.

## NOTES TO CHAPTER 10

1. See Sarakhsī, al-Mabsūt, vol. 9, pp. 91 ff; Schacht, Introduction, p. 151 f; cf. Ei, second edition, s.v. Ikrār.
2. See Abū Yūsuf, Ikhtilāf Abī Hanīfa, p. 156 f. Umm, vol. 6, p. 144; vol. 7, p. 139, L. 17; cf. Ibn Qudāma, al-Mughnī, vol. 9, pp. 68 f, and 80 f, and Sarakhsī, al-Mabsūt, vol. 9, p. 157 f.
3. See Abū Yūsuf, Ikhtilāf, op.cit., p. 70 f; Shāfi<sup>c</sup>ī, Umm, vol. 7, pp. 114, 167-8; Ṭaḥāwī, Ikhtilāf, p. 143; Sharḥ ma<sup>c</sup>ānī al-Āthār, vol. 2, pp. 81-83; cf. Sarakhsī, al-Mabsūt, vol. 9, p. 91 f. and p. 104 f.
4. See Abū Yūsuf, Āthār, H. 719, p. 157; and Kharāj, p. 98. But cf. Khawārazmī, Masānīd al-Imām, vol. 2, pp. 194 ff. and Umm, vol. 7, p. 114.
5. Kharāj, p. 98; cf. Ikhtilāf Abī Hanīfa wa Ibn Abī Laylā, pp. 70-71; 223 f. cf. Athār, p. 157.
6. Mudawwana, vol. 16, p. 91 f; Zurgānī, vol. 4, cf. Ṭaḥāwī, Ikhtilāf, p. 143.
7. Muwattā', Hudūd: C.1. H.6., and Umm, vol. 7, p. 114.
8. See Muwattā' al-Imām, p. 242.

9. Umm, vol. 7, p. 170; cf. p. 51 f; and vol. 6, p. 122 ff.  
cf. Abū Yūsuf, Ikhtilāf Abī Hanīfa, pp. 71 ff and 156 f.
10. The only possible way of "appeal" is to lodge claim  
against the suitability of the witness/es. See  
Mudawwana, vol. 16, p. 58 f. Umm, vol. 7, pp. 113 ff;  
cf. Ibn Hazm, al-Muḥallā, vol. 9, pp. 393 ff. In such  
a case, the ḥadd will be postponed.
11. Similarly, his withdrawal will make the rest of the  
witnesses, liable to the ḥadd of qadhf for giving a  
false statement. See Umm, vol. 6, pp. 122 ff. and p.141.  
Mudawwana, vol. 7, pp. 37 ff, and Ibn Qudāma, al-Mughnī,  
vol. 9, pp. 72 ff. cf. vol. 10, p. 128 f.
12. See Kharāj, p. 102 f. cf. Ikhtilāf Abī Hanīfa wa Ibn  
Abi Laylā, pp. 152, 156 and Sarakhsī, al-Mabsūṭ, vol. 9,  
pp. 142 f; and 182 f.
13. Umm, vol. 6, p. 120 f; vol. 7, pp. 138 f, 169-170,  
and 114; cf. p. 51, L. 18.
14. Umm, vol. 6, p. 121, L. 2.
15. See Ibn Qudāma, al-Mughnī, vol. 9, pp. 64-69; cf.  
Ibn Hazm, al-Muḥallā, vol. 11, pp. 176 ff.
16. Masā'il Aḥmad, MS, no. B20753 Dār al-Kutub, fol. 80.  
cf. Ibn Qudāma, op.cit., topic 7182, p. 64-65.

17. See synopses below. cf. Ibn Ḥazm, op.cit.; Ṭahāwī, Sharḥ Ma<sup>c</sup>ānī al-Āthār, vol. 2, p. 82 f.
18. See Bāb al-l<sup>c</sup>tirāf bi al-zinā, Hudūd: See Fath, vol. 15, pp. 148 ff.
19. See p.104 and n.47 above.
20. Shaybānī transmits this version from Mālik but remains silent about its content; see Muwatta' al-Imām, p.242 ; See also Ṭahāwī, Sharḥ Ma<sup>c</sup>ānī al-Āthār, vol. 2, pp.81-83.
21. Ibid., p. 81; cf. Sarakhsī, al-Mabsūṭ, vol. 9, pp. 91 ff.
22. See Abū Yūsuf, Ikhtilāf Abi Ḥanīfa, p. 156 f; Umm, vol.6, p. 144; vol. 7, p. 139; and Sarakhsī, al-Mabsūṭ, vol. 9. p. 157, and 191 f.
23. "Hal al-ḥudūd jawābir am kawasir?" See Sarakhsī, Sharḥ al-siyar al-kabir, vol. 4, p. 210; Ibn Ḥazm, al-Muḥallā, vol. 11, p. 124-31; cf. Ibn Qudāma, al-Mughnī, vol. 7, vol. 7, pp. 68-69.
24. See Sarakhsī, Sharḥ al-siyar, op.cit., Ibn Ḥazm, al-Iḥkām fī uṣūl al-Aḥkām, vol. 2, p. 1141 f. cf. Shafi<sup>c</sup>i, Umm, vol. 7, p. 51 f.
25. Abū Yūsuf, Ikhtilāf Abī Ḥanīfa, pp. 156 f; Sarakhsī, al-Mabsūṭ, vol. 9, p. 191 ff. cf. Abū Yūsuf, al-Āthār, p.157 and Shafi<sup>c</sup>i, Umm, vol. 6, p. 4, 144, passim.



26. Abū Yūsuf, Āthār, op.cit., Ikhtilāf Abi Hanifa, op.cit.,  
cf. Ibn Qudāma, al-Mughnī, op.cit., cf. p. 80.
27. Muwatta', Hudūd: C. 2, H. 2.
28. Umm, vol. 7, p. 139; cf. vol. 7, p. 51, and vol. 6,  
p. 144.
29. In fact, he draws his rubric from this component when  
he says: Bāb mā jā'fī dar' al-ḥadd<sup>C</sup> an al-mu<sup>C</sup>tarif  
Idhā raja<sup>C</sup>.

## NOTES TO CHAPTER 11

1. Ibn <sup>C</sup>Abdulbarr, al-Ishtidhkār, Dār al-Kutub, Cairo, MS. No. 24 Ḥadīth, fol. 248b f.; Ṭahāwī, Ikhtilāf, pp. 149 f. and 179; Ibn Qudāma, al-Mughnī, vol. 9, pp. 79 ff; al-Muqni<sup>C</sup>, vol. 3, p. 467 f; cf. Umm, vol. 6, p. 122 (cf. p. 138); and Ibn Ḥazm, al-Muḥallā, vol. 11, p. 291 f.
2. Ibn Qudāma, al-Mughnī, op.cit., al-Muqni<sup>C</sup>, op.cit., and Dasūqī, Hāshiyat al-Dasūqī, vol. 4, p. 319.
3. Ibid. cf. A.A. Maṣṣūr, Nizām al-Tajrīm, vol. 1, p. 242; cf. al-Muqni<sup>C</sup>, op.cit., p. 468, n. 1.
4. Shaybānī, Masā'il al-Shaybānī, Dār al-Kutub, MS B20331, fol. 151; cf. al-Istidhkār, op.cit.
5. Ibid. Cf. A al-Ḥuṣarī, al-Ḥudūd wa al-Ashriba fī al-fiqh al-Islāmī, p. 180.
6. Ibid.
7. Daraqutnī, Ḥudūd: H. 8-10, vol. 3, p. 84; see above p.
8. Muwatta', Ḥudūd: C.4. H.1; see also al-Bājī, al-Muntaqā, vol. 7, pp. 138 ff.
9. Ibid., al-Istidhkār, op.cit., cf. Ibn Qudāma, al-Muqni<sup>C</sup>, op.cit.

10. al-Istidhkār, op.cit.; for the biography of al-Battī see Tahdhīb, vol. 7, entry 303, p. 153 f.
11. See above p. 146 ff.
12. See also Tayalisi, H. 24; Musnad al-Shāfiʿī, p. 95, cf. L.22; and Schacht, Origino, pp. 25, 32 and 191.
13. Shaybānī transmits it from Mālik without comment. See Muwattaʿ al-Imām, H. 692, p. 241.
14. Once again Zuhri's name has been offered as the common link for all later isnāds. Shākir rejects the idea that Ibn Musayyib had received the pericope directly from ʿUmar. See al-Musnad, Shākir's edition, vol. 1, p. 302; cf. N. 197, 276 and 249. But cf. Chapter 6, n.7 above.
15. Some of the Irāqīs, however, belonging to the Post-Classical period and most probably supporting the Mālikite attitude for the validity of the illegal pregnancy as a means of conviction, expanded the ḥadīth of ʿAlī as follows:-

O you people. There are two types of zinā.

A mysterious zinā and apparent zinā.

A mysterious zinā is an action which has been proved through witnesses. In such a case, the witnesses should be the ones to case the first stones. An apparent zinā is an action which has been established through confession or illegal

pregnancy. In such a case, the Imām should be the person to cast the first stone.

Bay. Hudūd: C.11, H. 1 and 2.

Šana<sup>c</sup> ānī knows the ḥadīth but without the pregnancy component. See, al-Muṣannaf, vol. 7, H. 13350-56, pp. 326-28. Cf. Kharāj, p. 98, l.4; Mudawwana, vol. 16, p. 41; and Ibn Qudāma, al-Muqni<sup>c</sup> op.cit., pp. 448 and 468, n.1. A considerable opposition was raised with reference to the authenticity of the pericope. See Zayla<sup>c</sup>ī, Naṣb al-Rāyat, vol. 3, pp. 319-20 and 329.

- 16 See Umm, vol. 7, p. 140 f.
17. Ibn<sup>c</sup> Abdalbarr, op.cit., cf. Umm, ibid.
18. This is a free translation of "Idhā kāna fī al-ḥudūd la<sup>c</sup>alla wa<sup>c</sup> asā fahuwa mu<sup>c</sup>aṭṭal/mu<sup>c</sup>aṭṭil". Shaybānī, Masā'il al-Shaybānī, op.cit., fol. 151.
19. "Idra'ū al-ḥudūda mastata<sup>c</sup> tum". Ibid. See Kharāj, p. 90. For the credibility of the maxim see Naṣb al-Rāyat, op.cit., vol. 3, pp. 333 ff; cf. Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 153-6. See also Schacht, Origins, pp. 184, 235 and 285.
20. Mudawwana, vol. 16, p. 36.
21. al-Istidhkār, Dār al-Kutub, op.cit., fol. 249 b f.

22. Ibid. See also Ṭaḥāwī, Ikhtilāf, p. 141 f; cf. Ibn Qudāma, al-Mughnī, vol. 9, pp. 46-7.
23. al-Istidhkār, op.cit. See also Mudawwana, vol. 16, p. 50; cf. Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 173-6.
24. al-Istidhkār, op.cit., fol. 248 b. cf. fol. 249 a. Mukhtaṣar al-Muzanī, on the margin of the Umm, vol. 5, p. 166 f. cf. vol. 6, p. 149, and vol. 7, p. 41. See also Ibn Qudāma, al-Mughnī, op.cit.
25. Ibid. Cf. p. 79 f. See also Umm, vol. 6, p. 200.

## NOTES TO CHAPTER 12

1. For different definitions of the term, see El second edition, s.v. ḥadd. See also Ibn Qutayba, Gharīb al-ḥadīth, vol. 1, p. 222. Cf. Rahman, F. "The concept of ḥadd in Islamic Law", Is. Stud. 4 (1965), pp. 237-251.
2. However, neither the Qur'ān nor the early ḥadīth has employed the term for the prescribed penalties. Nevertheless, the term itself is Quranic, always employed in plural: ḥudūd to denote God's sets of rules, Q:2.230; 4.13; 58.4 and 65.1; prohibited areas/ issues, usually preceded by the verb root <sup>c</sup>a-d-w (i.e. to cross over), Q:2.197, 229 and 65.1; and God's boundaries, Q:9.97; 4.14 etc. For the prescribed penalties, the Qur'ān uses jazā (root j-z-y, i.e. to reward, to pay back, etc.), Q:5.33 and 38, cf. 42.40; 46.14 and 55.60.  
See also
3. Quoting anonymous scholars, Ibn Hajar lists seventeen crimes which fall under the fixed penalties amongst which are sorcery, lesbianism, sodomy, bestiality, homicide, etc. See Fath, vol. 15, p. 61. cf. Rahmān "Concept of ḥadd" *IS*, 4 (1965), pp. 237-251.
4. This is a Quranic ḥadd, which is 80 lashes, see Q:24.4. However, there is a dispute concerning the type of words which may or may not constitute qadhf. See Schacht, Introduction, pp. 125, and 179; El, first edition,

s.v. Ḳadhf. Consequently, a number of prophetic and non-prophetic ḥadīths came into existence, see Wensinck, The Concordance, s.v., qadhf, ḵhabīth, mukhannath and zani. Cf. Sarakhsī, al-Mabsūṭ, vol. 9, pp. 119-127, and Ibn Qudāma, al-Mughnī, vol. 9, pp. 47 ff.

5. The ḥadd is forty lashes according to prophetic ḥadīths. See Han. vol. 1, pp. 82, 140, 144; vol. 2, pp. 25, 46, 51, 136, 191, 211, 214, 280, 291, 299, 504, 519; vol. 3, pp. 32, 34, 67, 98, 115, 176, 180, 247, 272, 449; vol. 4, pp. 7, 8, 88, 93, 350, 351, 384, 388; vol. 5, p. 369; vol. 6, p. 139; Ma. Ashriba: H.1 ; Tay. H. 1970, 2176; Bu. Wakāla: 8 and 13; Fadhā'il al-Qur'an: 8; Ashriba: 10; Hudūd: 2 and 5; Mu. Hudūd: H.35 and 38; Daw. Hudūd: 35 and 36. Cf. Tir. Hudūd: 15; Jah. Hudūd: 17 and Tay. H. 2337. <sup>c</sup>Ali and <sup>c</sup>Umar are reported to have raised the ḥadd to eighty lashes. See Ma. Ashriba: H.2.; Similarly, <sup>c</sup>Ali is reported to favour death penalty. See Tay. H. 183 and Han. vol. 1, pp. 125 and 130. In addition to this, there is also ikhtilāf about the amount and type of the alcohol consumed before the ḥadd can arise. See Wensinck, s.v. sakara, sukr, nabīdh and khamr.
6. The penalty is the amputation of the hand. This is quranic punishment, Q: 5.38. However, there is wide disagreement concerning the amount of the hand to be amputated, the value, the place and the type of the stolen property and finally the motive for theft. Each of these issues is supported by a number of traditions

whether for or against. See Wensinck, The Concordance, s.v. sariqa. For the earliest ikhtilāf, see Abū Yūsuf, Kharāj, p. 101 f. Cf. <sup>c</sup>Abd al-Aziz, R. al-Ratāj, vol. 2, p. 332 ff.

7. The punishment is quranic. See Q: 5.33, known as āyat al-muḥāraba. Four punishments have been mentioned by the Qur'ān. Death, crucifixion, cutting off the opposite limbs - right hand and left leg or vice versa - and banishment. The ikhtilāf is centred on the applicability of either of the punishment/s. See Schacht, Introduction, p. 180 f. Wansbrough has noted that preference was given to "punishment to fit the crime", Oral Law, unpublished article on ḥadīth.

For comparison only, a contemporary example is the attitude of Khomeini's judges in Iran, such as Ayātollāh Ṭalaqānī, who put to death the opponents of the government - the Mujāhidun - on the basis of Q: 5.33; for they are regarded as mufsidūn fī al-ardh. See Maḥmūd al-Najjar, al-thawrat al-Īrāniyya, p. 186 f.

8. Originally, the prescribed penalty was associated with a story known as the ḥadīth of Banū <sup>c</sup>Uraina. See Tay. H.2002; Han. vol. 3, pp. 107, 163, 170, 177, 186, 198, 205, 233, 287 and 290; Bu. Jihād: 152; Maghāzī: 39, (cf. 37); Ayman: 15, 18; Hudūd: 22; Mu. Qasāma: H. 9-14; Daw. Hudūd: 3; Tir. Tahāra: 55; Jah. Hudūd: 20; Nas. Tahāra: 190; Tahrīm: 7-9; Ibn Sa'd., vol. 2, section 1, p. 67 and Wāqidi, p. 240. Later, however,



the content of Q: 5.33 was adopted and the hurūb al-ridda (the wars of apostasy), during Abū Bakr's reign, came to be the classical example. See Wansbrough, QS pp. 185. The war itself came to be known as a major historical event, which led to the writing down the Qur'ān and also to provide some explanations for the loss of few "known" verses(!). Among these is the verse of the Stoning Penalty. (see p.315 below ). But cf. Ibn Qutaiba, Ta'wīl mukhtalaf al-hadīth, p.310 f in which <sup>C</sup>Āisha gives her own account for the loss of the SP verse; also cf. The Story of <sup>C</sup>Umar, above; and Burton, CQ, p. 77 ff and 95 f. For the ridda see EI first edition, s.v. ridda and Schacht, Introduction, op.cit., p. 133 and 187. As for the gurrā', traditionally described as: reciters, see Sha<sup>C</sup>bān, cf. Wansbrough, SM, p. 69 and Wensinck, op.cit., s.v. q-r-' and gurrā'. For the ḥadīth material dealing with ridda see, Ma. Zakāt: C.18, H.1; Han. vol. 1, pp. 11, 19, 36 and 47; Bu. Zakāt: 1 and 40; Istitābat al-murtaddīn: 3; I<sup>C</sup>tishām bi al-Kitāb wa al-Sunna: 2, Mu. Imām: H.32; Daw. Zakāt: 1; Tir. Imām: 1; Nas Zakāt:3; Jihād: 1; and Tahrīm: 1. cf. Wensinck, The Concordance, s.v. ridda.

9. See Ibn Rushd, Bidāyat al-Mujtahid, vol. 2. pp.426 ff.
10. See Shahrastānī, al-Milal wa al-Nihal, pp 85-93. Wellhausen, The Religio-Political Factions in Early Islām, pp. 1-91; Watt, M. Islam and the Integration of Society, p. 99 and n.1; EI, s.v. Khawārij.

11. See Fath, vol. 15, pp. 127 and 160; Ibn Hazm, al-Muḥallā, vol. 11, pp. 232 ff.
12. The prime force in Mu<sup>c</sup>tazila thinking is philosophy and reasoning. See Wolfson, H.A. The Philosophy of the Kalām, pp. 18 ff; Watt, M. op.cit., pp. 177 ff and 233 ff; Islamic Philosophy and Theology, pp. 58-71; EI, s.v. Mu<sup>c</sup>tazila. Shāfi<sup>c</sup>ī demonstrates the existence of two types of anti-traditions. Those who rejected certain ḥadiths, the ahl al-ra'y and those who rejected ḥadiths in general, the ahl al-kalām. The ahl al-ra'y, the early Irāqis, accepted the principle of the so-called khabar al-wāḥid. Shāfi<sup>c</sup>ī's main opposition to them is that they preferred decisions ascribed to their local authorities, such as Shurayḥ, Ḥammād, Nakha<sup>c</sup>ī, etc., to contrary authority ascribed to the Prophet. See Umm, vol. 7, pp. 254 ff; cf. Schacht, Origins, -.27 ff. Shāfi<sup>c</sup>ī identifies them as those who rejected certain ḥadiths, Umm, op.cit.; cf. Schacht, Origins, p. 46 ff. Ibn Qutaiba provides more vivid examples; Ta'wīl, pp. 52-4, cf. 57 f. However, examination of early Irāqis' attitude towards prophetic ḥadiths, as opposed to non-prophetic ḥadiths shows that they were not in favour of non prophetic ḥadiths. Rather, they either had no prophetic ḥadith for the issue in question, or that the alleged prophetic ḥadith was doubtful as far as they were concerned. Wansbrough has noticed similar behaviour from Mālik. See SM, pp. 81, 96-7; But cf. Schacht, Origins, pp. 20, 20, passim. The situation itself could be taken to reveal the early norms of

fabrication.

13. Shāfi<sup>c</sup>ī is the first person to record the opposition of the Qur'anic party in his writings. See Umm, vol. 7, p. 15, L. 27; followed by Ibn Qutaiba, see Ta'wīl Mukhtalaf al-Hadīth, pp. 93, 189-93, 244 and 310-14. The issue was then taken up by later historians and historiographers, see Shahrastānī, op.cit., pp. 29 ff; and al-Baghdādī, al-Farq bayn al-firāq, pp. 72 ff; al-milal wa al-nihāl, pp. 57 ff; cf. Seelye, K. Chambers, Moslem Schisms and Sects, (translation) pp. 74 ff; Jārullāh, Z.H. al-Mu<sup>c</sup>tazila, pp. 12-46.
14. Although Shāfi<sup>c</sup>ī does not identify his opponents, the tone of the opposition, together with its logical background, show that the protagonists were the ahl al-kalām. The implication is that a single transmitter, apart from the fact that it is most unlikely he should be the only person to relate a historic event and hence his name is more likely to have been used for such a report, cannot be trusted for issue which touch the welfare of the public or the life of an individual. Thus, the ahl al-kalām insisted that a report of such nature must be transmitted by at least two people. According to Ibn Qutaiba, the ahl al-kalām themselves disagreed on this issue. Some insisted that the number of transmitters must be up to twenty. See Ta'wīl, p. 65 f; cf. Schacht, Origins, pp. 41 f, passim. In contrast, Shāfi<sup>c</sup>ī's arguments with the ahl al-kalām rest on a number of

points: the acceptability of a report from individuals, see Umm. vol. 7, pp. 250-4; reports which contradict each other, Ibid. 252, and reports which contradict the Quranic ruling, Ibid. 252 and 15. Discussions for the unreliability of khavar al-wāhid were common among the anti-tradition forces. See Schacht, Origins, p.50 ff.

15. It was the ahl al-kalām who initiated the doctrine of tawātur - widely reported -, Ibid. p. 51. Cf. Shāfi<sup>cī</sup>, Risala, nos. 1220-22, 1228-34 and 1308. The complete discussion for and against is recorded in the Risala, pp. 369-401 (Shākir edition). cf. Umm. vol. 7, pp. 250-62.
16. See Ibn Hazm, al-Muḥallā, op.cit.
17. See Schacht, Origins, pp. 55, 253, 256, 287, 215 ff, and 324.
18. See Wellhausen, op.cit.; El, s.v. Khawarij. See Hinds, M. "The Ṣiffīn Arbitration Agreement", JSS (1972), pp. 93-129; cf. "The Banners and Battle Cries of the Arabs at Ṣiffīn", Abḥāth (1971), pp. 3-42; and The early history of Islamic schism in Irāq. Ph.D. Thesis, University of London, 1969.
19. cf. Ibid., see "Kufan political alignments" IJMES (1971), pp. 346-367; Hawting, "The significance of the slogan...", BSOAS, 1978, pp.458 ff. See Watt, Islām and the Integration of Society, pp. 94-104.

20. See Hawting, op.cit.; Wellhausen, op. cit., Schacht, Origins, pp. 260-61.
21. See Shahrastānī, al-Milal wa al-Nihal, op.cit., cf. Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 232 ff.; El, s.v. Azāriqa.
22. Shahrastānī, op.cit.; Ibn Ḥazm, op.cit., Fath, vol. 15, pp. 127, 160 f.
23. The Formative Period of Islamic Thought, p. 23 f.
24. See Wellhausen, op.cit., pp. 45-68.
25. See Fath, vol. 15, pp. 129, 160. Cf. Burton, CQ, p. 75, and no. 7-8. See below.
26. Cf. El, s.v. Rajm and Khawārij.
27. Cf. al-Tālibī, Arā. al-Khawārij, 112 ff.
28. See Wellhausen, op.cit., pp. 47-50 and 64. El, s.v. Najda b. ḌAmir al-Ḥanafī.
29. Ibid.
30. Wellhausen, op.cit., pp. 1-91.
31. Ḥanbal, vol. 1, p. 116. L.16. But cf. Bukhārī, who

transmits the same story from the same transmitter without "jald". Hud: C.7, H.1.

32. Hanbal, vol. 1, p. 143, L.8.

33. Hanbal, vol. 1, p. 116, L.14.

34. Hanbal, vol. 1, p. 141, L.6; passim. p. 153, L.20.

35. Cf. Fath, vol. 15, p. 160.

36. The chief transmitter of the story is Sha<sup>c</sup>bī (d.110), a worthy of Kūfa. See Origins, pp. 87, 230 f. Schacht has noted that his name was merely used for a number of traditions which could have not been older than the legendary Sha<sup>c</sup>bī. Ibid., p. 131, 203 n. 4, 231 and 241. As for the story under discussion, the traditionists themselves disagree about its authenticity - whether Sha<sup>c</sup>bī could have been an eye witness of the incident. al-Ḥāzimī rejected the story on the ground that Sha<sup>c</sup>bī did not hear it from <sup>c</sup>Alī. Fath., vol. 15, p. 128. L.26. Others, pointed out that the immediate transmitter is Ibn Alī Laylā (d.148) Ibid. p. 129, L.1. Dāraqutnī (d.385) - ḥadīth critic - acknowledged the isnād of Ibn Alī Laylā, but nevertheless strongly supported the view that Sha<sup>c</sup>bī must have heard it directly from <sup>c</sup>Alī. He goes even further to assert that the story is the only tradition transmitted by Sha<sup>c</sup>bī from <sup>c</sup>Alī. Ibid. p. 129. Ibn Hajar points out that Qa<sup>c</sup>nab b. Mihrāz transmitted

the story from Wahb b. Jarir (d.206, see Tahdhīb, vol. 11, entry 273, pp. 161-62) from Shu<sup>c</sup>ba (d.160) going back to Sha<sup>c</sup>bī from his father from <sup>c</sup>Alī. Ibid. But he recalls that Dāraqutnī has said that the addition of Sha<sup>c</sup>bi's father on the isnād is delusion. Ibid. p. 129, L.2. It is worth recalling here that Bukhārī, who transmits the story on the authority of Sha<sup>c</sup>bī, does not include the second portion: "...and I have flogged her in accordance with the Book of God". See Ibid. Hudud. C.7, H.1. Cf. Ibn Hajar's comment, Fath. vol. 15, p. 129, L.14 ff.

The earliest traditionist to incorporate the story in his work is Ṣan<sup>c</sup>ānī (d.211); Muṣannaf, vol. IX, p. 326, H.13350 f. and 13353 ff. Prior to that, the story was quoted by Shāfi<sup>c</sup>ī on the authority of Irāqīs who transmitted it but nevertheless had never acted accordingly. Umm. vol. 7, p. 150. cf. 167 and 168.

37. See Umm. vol. 7, p. 252, cf. ff.

38. See IE s.v. "ḥadīth"; cf. Umm. vol. 7, pp. 250 ff. Risala. nos. 998-1308, where neither mutawātir nor khabar al-wāḥid was a fixed terminology for the acceptability of ḥadīths. It was Tirmidhī, at the end of the line, who finally distinguished the khabar al-wāḥid as being "gharīb" - strange, but nevertheless could constitute an obligation. See Origins, p. 52.

39. See Ibn Qutaiba, Ta'wīl, pp. 93-4, 189-192 and 310 ff.

cf. Hinds, M. "The Siffin Arbitration Agreement", op.cit.  
pp. 100 ff.

40. That is, juridical decision given by a prominent scholar. Shāfi<sup>C</sup>ī uses the term : "muftīn" = those who had the right to decide on point of laws. Umm. vol. 7, 255, L.5, passim. For the names of early muftīs, see Ibid. p. 257.
41. The argument put forward, not by Mālik though, is that the fact that two different punishments were applied by the Prophet to two culprits for the same offence must mean that there was some reason for such distinction. Marital status was the choice. Shāfi<sup>C</sup>ī states:  
"...his son was virgin and the wife of the other man was non-virgin..." Ikhtilāf al-Ḥadīth, on the margin of Umm. vol. 7, p. 251. Cf. Ahkām al-Qur<sup>C</sup>ān, p. 302.
42. Kitāb al-Mu<sup>C</sup>tamad, p. 429, and Kashshāf, s.v. Sura 24. verse 2. Cf. Burton, CQ, p. 93 f. The juridical "agreement" on applying Jald upon the bikr is perhaps better illustrated by Ibn Ḥazm, in his work on the Marātib al-Ijmā<sup>C</sup>, when he said:

وَاتَّقُوا أَنْ مَنِ زَنَى وَهُوَ حُرٌّ بَالِغٌ غَيْرُ مُحْصَنٍ وَهُوَ عَاقِلٌ مُسْلِمٌ فَيَسْكُرَانِ وَلَا  
مَكْرَهُ فِي أَرْضٍ غَيْرِ حَرَمٍ مَكَّةَ وَلَا فِي أَرْضِ الْحَرْبِ بِأَمْرَةٍ بِالْعَةِ لَيْسَتْ أُمَةً لَزَوْجَتِهِ  
وَلَا لَوْلَاهُ وَلَا لَأَحَدٍ مِنْ رَقِيقَتِهِ وَلَا لَأَحَدٍ مِنْ أَبْوَيْهِ وَلَا مِنْ وَلَدِهِ بِوَجْهِ  
مِنْ الْوُجُوهِ وَلَا أَدَى أَنْزَلِ زَوْجَتِهِ وَلَا أَدَى أَنْزَلِ أُمَّتِهِ بِوَجْهِ مِنْ الْوُجُوهِ  
وَلَا مَنِ الْمَغْنَمِ وَلَا مَنِ الْخُدْمَةِ لَهُ وَلَا مَبَاحَةَ النِّجْرَةِ لَهُ مِنْ مَالِكِهَا  
وَمَنِ عَاقَلَهُ غَيْرُ سَكْرَى وَلَا مَكْرَهَةٍ وَلَا حَرَمَتِهِ وَلَا مَنِ مَسْتَأْجِرَةً  
لِلزَّانَا وَلَا مَنِ أُمَّتِهِ مَتْرُوحَةً مِنْ عِبْدِهِ وَلَا مَنِ ذَمِيَّةً وَلَا مَنِ  
حَرَبِيَّةً وَهُوَ يَعْلَمُ أَنَّهَا حَرَامٌ عَلَيْهِ أَوَّلَيْسَتْ مِلْكًا لَهُ وَلَا عَقْدٌ  
مِلْكِيهَا نِكَاحًا وَلَا يَتَّبِعُ وَلَا تَقَادِمُ زِنَاهُ قَبْلَ أَخْذِهِ بِشَهْرٍ وَلَا  
تَزْوِجَهَا وَلَا اشْتَرَاها بَعْدَ أَنْ زَنَى بِهَا: أَنْ عَلَيْهِ جُلْدٌ مِائَةً



### NOTES TO CHAPTER 13

1. This is how Q.6:74 calls Abraham's father. Ṭabarī provides the existing dispute concerning the name. Among interesting views is the account of Mujāhid who says: "Āzar is not the name of Abraham's father, it is the name of an idol. Abraham's father is called: Tāriḥ". Ṭabarī's tafsir, vol. 7, pp. 242 ff. for Sūra. 6. A similar claim is reported by Ibn Qutaiba: al-Ma<sup>c</sup>ārif, p.30. For more information see EI, s.v. "Azar" by A. Jeffery. Cf. Arabic version of EI, "Dā'irat al-Ma<sup>c</sup>ārif al-Islāmiyya", s.v. "Āzar", where Ibrahim al-Abyārī provides a very long comment on the subject.
2. See Lisān al-<sup>c</sup>Arab, s.v. "R-j-m".
3. See the Handbook, Wensinck, s.v. Stoning Penalty; cf. Arkoun, M. "The death penalty and torture in Islamic Law" Concilium 120 (1978), pp. 75-82.
4. JSS. 1975, pp. 47-75.
5. Ibid., pp. 47-48.
6. See Lisān, s.v. h-s-n.
7. Q.59, known as sūrat al-Ḥashr - The Gathering or Expulsion, - is taken by Muslims to describe God's intervention in the expulsion of a Jewish tribe, Banū al-Nadīr, from

Medina after their treachery against the Muslims of Medina. The sūra refers to the dislodgement of the Banū Naḍīr from their homes practically without violence. It was after the long siege during which the Muslims nearly gave up that the Jews were "wise" enough to leave. See Yūsuf Ali's Translation, p. 1520. n. 5369-79. Also see Ṭabarī, sūrat 59.

8. See Lisan, s.v. h-s-n.
9. Ibn Hishām, Sīra, vol. 11, pp. 306-7, reporting on the account of the Ifk. However, Ibn Hisham states that he was informed by Abū 'Ubaida that the composer of the verse was an anonymous woman who sang the verse before 'Āisha praising the daughter of Hassān, to which 'Āisha responded by saying: "Yes, she may be, but certainly not her father". Ibid. p. 307, but cf. n. 3. pointing out the grammatical mistake: "Lākinna abūha" instead of "abāha".
10. Muwatṭa' al-Imām, p. 242. Ṭahāwī, Ikhtilāf, p. 139.
11. Muwatṭa' al-Imām, op.cit. commenting on H.692-94. "wa bi hādha kullih na' khudh...."
12. Ibid. H. 694.
13. Ikhtilāf Abī Hanīfa wa Ibn Abī Laylā; pp. 220-221; Ṭahāwī, Ikhtilāf al-fuqahā', p. 139.
14. JSS. 'The Meaning of Iḥṣān', p. 55, L.22.

15. cf. Umm. vol. 6, p. 125, where Shāfi<sup>c</sup> records a discussion with an anonymous representative of Irāqis, within which he tries to twist the proof of Irāqis, for this practice, and makes it favourable to his views. The Irāqis argue that Dhimmi should be referred to their religious leaders. They base this practice on a story ascribed to Ali, (on the authority of Sufyan al-Thawrī (d.161), who advised Muḥammad b. Abī Bakr on a case of adultery involving a Muslim and a dhimmiya: "Punish the muslim and send the dhimmiya to her people". Cf. Shāfi<sup>c</sup>'s reply. Ibid. But cf. Ṭahāwī, Ikhtilāf, p. 141.
16. Ibid. p. 139; cf. Sarakhsī, vol. 9, p. 39 f.
17. Abū Yūsuf; Kharāj, p. 99, L. 2. cf. Ibid., p. 98, L.24.
18. Muwatta' al-Imām. K. Hudūd: H. 694.
19. Kharāj: p. 98, L.2.
20. Ibid. L. 18.
21. I do not understand this distinction unless we are asked to include peoples other than those traditionally known as the ahl al-Kitāb, i.e. Jews and Christians, such as Majūs, i.e. adherents of Mazdaism; since when the Treasury of the State was short of money many peoples other than Jews and Christians were included in the institution of Jizya. A Prophetical ḥadīth was produced in which

Muhammad is alleged to have been asked about the majūs how should they be considered in matters of Law? he was claimed to have said: "Treat them in the same way as you treat the dhimmis". (Sunnū fīhim sunnat ahl al-Kitāb) Umm. vol. 4, p. 96, L. 28. In fact Shāfi<sup>c</sup> provides a special chapter dealing with the question of treating various types of people as dhimmis. Most of the arguments there are provided with either Prophetical ḥadīth or a practice of the Rāshidūn. Ibid. "Man yulḥaq bi ahl al-Kitāb", pp. 95-97. See also Ma. Zakāt: 42.

22. Kharāj, p. 98, L. 23.

23. Ibid., cf. Ṭahāwī, Ikhtilāf, p. 139.

24. See Schacht, Origins, pp. 233-37, 230-31, and 25-27 respectively, where he discusses how these names were used to gain higher authority.

25. Mudawwana, vol. 16, p. 37, L.5.

26. Ibid. p. 36, L. 8 and p. 37, L. 12. cf. Muwatṭa', K. al-Nikāḥ: C. "Bāb mā ja' fi al-Iḥṣān". and Ṭahāwī, Ikhtilāf, p. 139.

27. Muwatṭa', op.cit. H. 40.

28. Ibid. "Bāb al-Nahy <sup>c</sup>an nikāḥ imā' ahl al-Kitāb".

29. Ibid. "...fa hunna al-Ḥarā'ir min al-Yahūdiyyāt wa al-Naṣrāniyyat...fa humn al-Imā' al-Mu' mināt..."
30. Ibid. C.17.
31. For the advantage of his name, see Schacht, Origins, pp. 243-46.
32. Ibid. pp. 113, 117 and 243 ff.
33. Ibid. pp. 246-7.
34. Muwatta', Nikāḥ: C.17. The idea behind it is that since God has forbidden to marry those who are already under the marriage contract, sexual intercourse with these women by man other than the lawful husband is zinā. Such action will not constitute Iḥṣān. Cf. al-Bājī, al-Muntaqā. vol. 3, pp. 329-34.
35. Ibid. C.17, H.40. "...wa kull man adraktu kāna yaqūl dhālik..."
36. Ibid. "Qāla Mālik: Yuḥṣin al<sup>C</sup>-Abd al-Ḥurraṭidhā massahā bi nikāḥ wa lā tuḥṣin al-Ḥurraṭ al<sup>C</sup>-Abd..."
37. Ibid. "Wa qāla Mālik: "Wa al-Ḥurraṭ al-Naṣrāniyya wa al-Yahūdiyya wa al-'Amat al-Muslima yuḥṣinna al-Ḥurr al-muslim". See also Ṭaḥāwī, Ikhtilāf, p. 139.
38. For Mālik this is a very important condition to exclude

what he considers as being invalid marriage: fāsīd etc.  
See Mudawwana, vol. 3, pp. 15 and 38; and vol. 76, p.37.  
Cf. Origins, pp. 182-3, and 171.

39. Mudawwana. vol. 16, p. 42 "Ara'ayta, al-Muslim yaznī bi al-Dhimmiya? Qāl: qāla Mālik: Yuhadd al-rajul wa turadd al-mar'a ilā ahl dīnihā..." and p. 55-56, L. 21.
40. San<sup>c</sup> ānī, vol. 7, H. 13620 and 21. p. 397. 'Atā is also credited with the view that: "If a free non-virgin or virgin man fornicates with a slave woman none should be stoned to death. They should be flogged. Similarly, if a free woman fornicates with a male slave none should be stoned to death, rather they should be flogged. 'Atā' used to hold contrary views until he heard Ḥabīb b. Thābit saying this; so he changed his views". Ibid. H. 13391, p. 336. Sufyān al-Thawrī, Kūfian, disagreed with this new view of 'Atā'. The free culprit should be stoned to death. Ibid. H. 13392. Similar view attributed to Qatāda (Medinian d. 118) Ibid. 13390.
41. Ibn Musayyib, Ibid. H. 13292; Mudawwana, vol. 16, p. 37.
42. Ibn Hazm, al-Muḥallā, vol. 11, pp. 238-9. Ṭahāwī, Ikhtilāf al-Fuḡahā', p.164 Cf. Burton, "The Meaning of Ihsan", JSS. p. 54-55. Some people tried to dismiss the whole problem by producing a prophetic ḥadīth in which Muḥammad was reported to have said: "God has postponed the punishment of slaves and non-Muslims until the last

day of Judgement", see Daraq: Hudūd: cf. H.19, p. 87;  
H.35, p. 91.

43. Ṭahāwī, Ikhtilāf, p. 139.

44. But it also signifies that by the time of Mālik the  
Ikhtilāf about the term was already deep rooted. Similarly,  
Mālik's failure to find a Prophetical hadith defining the  
term or even incorporating it in any ḥadīth, demonstrates  
that by his time, at least in Medina, the attempts to  
produce hadiths referring to Iḥṣān did not start yet.

45. Hence, to Mālik, thayyib is a synonym of Iḥṣān. However,  
in case of marriage between slave male and free woman,  
the slave cannot acquire Iḥṣān by virtue of his marriage.  
He is thayyib but not muḥṣan. In any case, Mālik does  
not think that slaves have the right of acquiring Iḥṣān.  
This is the only area in which I see Mālik making a  
distinction between muḥṣan and thayyib. We have already  
seen him glossing "Shaikh and shaikha" as thayyib and  
thayyiba, and making the Prophet asking Mā'iz whether  
he was thayyib or not. See respective stories above;  
but cf. Burton, The Meaning of Iḥṣan. JSS. p. 50.

46. See The Story of ʿUmar, above.

47. For the advantage of this name see Schacht, Origins,  
p. 177 ff.

48. Thaqafite, n.d. She was married to Ibn<sup>c</sup>Umar. See Ibn<sup>c</sup>Abdulbarr, Tamhīd, vol. 1, p. 204. n. 526. See Tahdhib, vol. 12, entry 2831, p. 430 f.
49. Muwatta'. Hudūd: C.2. H.13.
50. Ibid. C.3. H.14; Bukhāri. Buyū<sup>c</sup>: 34. "Hudūd: 66; Muslim. Hudūd: 29 and C.6 H.33.
51. Ikhtilāf al-Fuqahā'. p. 140. Cf. Fath. vol. 15, pp.176-78. Bukhāri also incorporates the ḥadīth in the Buyū<sup>c</sup> section going back to Ibn<sup>c</sup>Uyayna without the phrase: "wa lam tuḥṣan/tuḥṣin". also cf. Hudūd: C.40. "Bāb lā yutharrib<sup>c</sup> alā al-'ama idhā zanat..."
52. Shāfī who transmits the ḥadīth from Mālik takes the liberty of omitting the phrase sometimes. See Umm. vol. 7, p. 167, L. 30 ff. and vol. 6, p. 121, L. 9. passim.
53. Risāla, nos. 390-92. cf. nos. 386-89.
54. Umm. vol. 6. pp. 124 ff. Cf. vol. 7. pp. 38 ff; and Tahāwī, Ikhtilāf, p. 141.
55. See Ibn Qutaiba reporting about the opposition of the Mu<sup>c</sup>tazila supporting the Khawārij. pp. 192-3. Ibn Qutaiba perhaps unaware of the early interpretations of muḥṣanat in Q.4.25, or fully aware of the grave implications which the early scholars failed to note, says:



"If the meaning of muḥṣanāt was those who have been in marriage contract, as they (the Khawārij) claim then their objection would have been sound and their view would have been right. But muḥṣanāt in this verse does not mean those who are under marriage contract, rather it means free women..."

56. Risala, nos. 683-84. cf. no. 389.
57. Mukhtaṣar al-Muzanī, on the margin of Umm, vol. 5, p. 167 L. 22.
58. Risālā. nos. 387-89. Umm. vol. 6, p. 144, L.6.
59. Risālā. nos. 689-95. Umm. vol. 6, p. 143, L.12.
60. Ibid. pp. 142-44. Risālā. nos. 691-95, 688 and 382. The only Prophetical ḥadīth which contains the criteria for the SP and flogging is the Story of <sup>c</sup>Ubāda. Risālā. nos. 378-79 and 686. Umm. vol. 6, p. 119, L.22. passim. But cf. Ma. Hudūd: C.2. H.13. see n. 49 above.
61. Ibid. p. 124 ff. cf. vol. 7, p. 38 ff.
62. Umm. vol. 6, p. 126.
63. Ibid. p. 127, L.1.
64. Ibid. pp. 124-26; see also Tahāwī, Ikhtilāf, p. 141.

65. Ḥanbal is credited with contradicting views. Sometimes his view is identical to that of Shāfi<sup>c</sup> and sometimes similar to Abū Ḥanīfa etc., etc., both in general outline and proofs. See Ibn Qudāma, al-Mughnī, vol. 9, pp. 47 ff.
66. Cf. 'zawj': Q.2:35, 230, 102; 4:1, 20, 39:6 and 23:37. 'azwāj': 2:25, 3:115, 4:57, 33:37, 52 and 39:6. 'muṭallaqāt': 2:228 and 241.
67. Cf. 'amat': Q.2:221; 'imā' Q.24:32; 'ghilmān': 52:24 and 'ghulām': 12:19.
68. For instance, Q.3:64, 65 and 5:69. Cf. 5:47.
69. Cf. Burton, The Meaning of Iḥṣān. pp. 61 ff.
70. Cf. Ibid. p. 60 ff.
71. See Ibn Qutaiba, Ta'wīl mukhtalaf al-Ḥadīth, p. 93 ff.
72. Cf. Ibid. 193. Umm. vol. 7, p. 15, L.27. Cf. CQ. p. 90ff.
73. Q. 24:4, 23 cf. Q.24:6, and 4:15, 19 and 25.
74. See synopsis on Iḥṣān above.
75. See the Story of Mā<sup>c</sup>iz above. A similar attempt can be seen from Mālik when he glosses "Shaikh and Shaikha" in the Story of <sup>c</sup>Umar as thayyib and thayyiba. See the Story of <sup>c</sup>Umar above.

76. No one has ever transmitted the pericope of Mā<sup>c</sup>iz with the use of thayyiba or "athayyib anta?" All those versions which adopted similar attitude employed: "hal aḥṣanta?"
77. Mabsūt, vol. 9, p. 39. See Ikhtilāf Abi Ḥanīfa wa Ibn Abī Laylā, p. 221. n. 2. Albānī, in his Da<sup>c</sup>īfa wa al-Mawḍū<sup>c</sup>a, quotes Dārāquṭnī as saying: "The ḥadīth is munkar: p. 151. H. 717. The ḥadīth appears first in Sunan Dārāquṭnī, p. 350 where he recorded it in order to expose its unauthenticity. Bayhaqī, Sunan al-Kubra. vol. 8, p. 216. Zaila<sup>c</sup>ī, Naṣb al-Rāya, vol. 3, p. 327 and Ibn Asākir, Tārikh, vol. 13, p. 394. Cf. Burton, JSS. p.55.
78. Sarakhsī, Mabsūt, vol. 9, 39.
79. Jāmi<sup>c</sup> al-Saghīr, p. The Ḥadīth, however, first appears in Ṭabarānī, al-Awsaṭ vol. 1, p. 182. Albānī rejects the ḥadīth categorically as "mawḍū<sup>c</sup>". Da<sup>c</sup>īfa wa al-Mawḍū<sup>c</sup>a. p. 210. H. 797.
80. Sarakhsī, vol. 9, p. 39.
81. Fath, vol. 15, p. 185, L.13. But Qurṭubī supported the view that the Jewish couple were ḥarbiyyayn, i.e. muslims' enemies(!) Ibid. cf. Ibn Ishāq, Sira, vol. 1. pp. 544 ff; 564 ff.
82. Rabī<sup>c</sup>a, teacher of Mālik, insisted that the Prophet had used the Torah's judgement which had nothing to do with Islam. Ibid. L.6.

83. Muwatta'. Hudūd: C.1. H.6. cf. H.8 and 10. But cf. Fath, vol. 15, p. 149 ff.
84. Cf. Ibid. pp. 155 ff.
85. Umm. vol. 6, p. 126. cf. Mukhtaṣar al-Muzanī, on the margin of Umm. vol. 5, p. 203 f.
86. Umm. vol. 6, p. 126, L.8. I took the liberty of re-arranging Shafi's passage for the sake of simplicity.
87. Ibid. p. 124.
88. Umm. op.cit. "...wa hādha ma<sup>c</sup>nā qawlihi <sup>c</sup>Azza wa Jall:  
"Wa in ḥakamta faḥkum baynahum bi al-qīṣṭ" wa ma<sup>c</sup>nā  
qawlihi Ta<sup>c</sup>āla: "Wa anihkum baynahum bi mā anzala Allah"  
wa al-dalīl al-wāḍiḥ anna man ḥakama <sup>c</sup>alaihim min ahli  
dīn Allah fa innamā yaḥkum baynahum bi ḥukm al-muslimin..."  
Ibid.
89. Risāla, nos. 375-385. Umm. vol. 7, p. 75 f. cf. Burton.  
The Meaning of Ihsan. p. 59 f.
90. Ibid.
91. For juridical and doctrinal problems associated with this issue see Burton, CQ, pp. 46-112.
92. See Ibn Qudāma, al-Mughnī, vol. 10, pp. 120-22.

93. See Bukhārī. Hudūd: 26. Bukhārī points out that some transmitters mentioned Sūra 5, but he prefers the former. Ibid.
94. Mu. C.17; see Fath, vol. 15, pp. 155 ff.
95. Ibid. p. 156, L.5. The ḥadīth was originally reported by Hākim, Mustadrak, vol. 4, p. 359; see also, Bay Hudud: C.2. H.5.
96. Ibn Qutaiba, Ta'wīl mukhtalaf al-Hadīth, pp. 310-14.
97. Mustadrak, vol. 4, p. 360; see also Bay. Hudud: C.2, H.6 and 7. cf. Fath, vol. 15, p. 156, L.15.
98. Ibid. cf. Fath, vol. 15, p. 156, L.9. See also, Burton, CQ, pp. 72 ff.
99. Ibn Hazm summarizes the consensus as follows:

(see Chap.12,n.42 above) **واتفقوا أنه إذا زنى كما ذكرنا**  
**وكان قد تزوج قبل ذلك وهو [غير] خصي وهو بالغ مسلم حر**  
**عاقل حرة مسامة بالغة عاقلة نكاحاً صحيحاً ووطئها وهو في**  
**عقله قبل أن يزني ولم يتب ولا طال الأمر: أن عليه الرجم**  
**بالحجارة حتى يموت**  
 (Marātib al-Ijmā' , p.129)

NOTES TO CHAPTER 14

1. See Ris. nos. 375-92, 616, 646-49, and 682-95; Umm. vol. 7, p. 76; vol. 6, p. 119 passim.
2. San<sup>c</sup>āni, vol. 7. H. 13357/8, p. 328.
3. Ibid. H. 13313, p. 312. H. 13320, p. 314 and H. 13327, p. 315. (But cf. H. 13361/2); Abū Yūsuf, Ikhtilāf Abī Hanīfa wa Ibn Abī Laylā, p. 218; Shaybānī, al-Āthār, p.107.
4. See above (Chapter on Jald) cf. Kharāj, p. 98, L.5.
5. This is the father of Ibn Abī Laylā. See Tahdhīb, vol. 6. p. 260 ff.
6. See Tahdhīb, vol. 6, entry 855, pp. 402-6.
7. Ibid. vol. 8, entry 635, pp. 351-56.
8. Ibid. vol. 2, entry 516, pp. 285-89.
9. Ibid. vol. 5, entry 110, pp. 65-69.
10. See above. (Chapter Jald).
11. Cf. Ibn Qudāma, al-Mughnī, vol. 10, p. 124.
12. Mabsūṭ, vol. 9, p. 43 ff. Cf. Abu Yusuf, Ikhtilāf Abī Hanīfa wa Ibn Abī Laylā, p. 218, n.2.

13. Mudawwana, vol. 16, p. 36.
14. San<sup>c</sup>ānī, vol. 7, H.13358, p. 328 f.
15. Umm. vol. 7, pp. 150 and 167. Cf. Origins, Tr.11. p. 321.
16. Ibid. p. 11 ff. passim. Ris. nos. 1601-3 and 1712.
17. Risala, nos. 225-227, 375-92 passim. Cf. al-Ḥāzimī,  
al-I<sup>c</sup>tibār, fi al-Nāsikh wa al-Mansūkh, pp. 369-73.
18. See Umm. vol. 7, p. 167 f. cf. Kharāj, p. 98, L.5.
19. Ḥanbal, vol. 1. p. 143. cf. p. 153, L.20.
20. Two conflicting opinions are ascribed to Ibn Ḥanbal. See  
Ibn Qudāma, al-Mughnī, vol. 10. pp. 120-21. Cf. Tirmidhī,  
Hudūd: C.8. H.4.
21. Ibid. Cf. Fath. vol. 15, pp. 129-30, and Ibn Ḥazm,  
al-Muḥalla, vol. 11. pp. 235-237, nos. 2204.
22. See Origins, p. 208 and no. 2-5
23. Shaybānī, al-Āthār, Dār al-Kutub, MS, No. 104M, fol. 87-88.
24. Abū Yūsuf, Ikhtilāf Abī Hanīfa wa Ibn Abī Laylā, pp.218-9.
25. San<sup>c</sup>ānī. vol. 7. H.13323, p. 314. cf. H.13321, 13325,  
13326 and 13328.

26. See Umm. vol. 6, pp. 119 ff.
27. Ibid. vol. 7, pp. 167 ff.
28. Ibid. vol. 6. p 119, L.30.
29. "...wa law nufiyā nufiyā niṣf sanat wa hādhā mimmā astakhīr Allāh fihi". Umm. vol. 6, p. 144, L.11.
30. Ṭahāwī, Ikhtilāf al-Fuḡahā, p. 136 ff. Mabsūṭ, vol. 9. p. 43. and Ibn Ḥazm, al-Muḥallā, vol. 11, pp. 181-88; and pp. 229-35.
31. Ibid. pp. 237-42.
32. "wa lanā'anna al-ziyāda <sup>c</sup>alā al-naṣṣ naskh". Sarakhsī, op.cit.
33. Fath, vol. 15, p. 130, cf. 170. See Ṣan<sup>c</sup>ānī, vol. 7, H.13327, p. 315.
34. <sup>c</sup>Iyād quoted by Ibn Ḥajar, see Fath, vol. 15, pp. 130. Cf. Nawawī, Sharḥ Muslim, vol. 9, p. 121.
35. Cf. QS, pp. 192-202.
36. Cf. Ibn Ḥazm, Marātib al-Ijma<sup>c</sup>, pp. 129-33.



37 See Ris.nos. 375-92,616 and 682-95; and Ahkam al-Qur an, vol.1,pp.303-312.

38 Cf. QS,pp. 198,cf. 92 ff.; and CQ, pp.72-104.

Arabic Texts.

- a- جاءت اليهود الى رسول الله ( ص ) ، فذكروا له أنّ رجلا منهم وامرأة زنيا •
  - b- فقال لهم رسول الله ( ص ) : ما تجدون في التوراة في شأن الرّجم ؟
  - c- فقالوا : نفضحهم ويجلدون ،
  - d- فقال عبد الله بن سلام : كذبتُم ، إنّ فيها آية الرّجم •
  - e- فأتوا بالتّوراة فنشروها ، فوضع أحدهم يده على آية الرّجم • ثم قرأ ما قبلها وما بعدها ،
  - f- فقال له عبد الله بن سلام : ارفع يدك ، فاذا فيها آية الرّجم •
  - g- فقالوا : صدق يا محمد ، فيها آية الرّجم •
  - h- فأمر بهما رسول الله ( ص ) فرجما •
  - i- فقال عبد الله بن عمر : فرأيت الرجل يحني على المرأة يقيها الحجارة •
- قال مالك : يعني ب ( يحني ) : يكبّ عليها حتى تقع الحجارة عليه •

حدثنا محمّد بن عثمان بن كرامة العجليّ حدثنا خالد بن مخلد عن سليمان حدثني عبد الله بن دينار عن ابن عمر (رض)

- a- قال اتى رسول الله (ص) بيهودى ويهوديّة قد أحدثا جميعا .
- b- فقال لهم ما تجدون في كتابكم ؟
- c- قالوا انّ أحبّنا أحدثوا تحميم الوجه والتّجبية
- d- قال عبد الله ابن سلام ادعهم يا رسول الله بالتّوراة
- e- فأتى بها فوضع أحدهم يده على آية الرّجم وجعل يقرأ ما قبلها وما بعدها
- f- فقال له ابن سلام ارفع يدك فاذا آية الرجم تحت يده
- g- nil.
- h- فأمر بهما رسول الله (ص) فرجما
- i- قال ابن عمر فرجما عند البلاط فرأيت اليهوديّ أجناً عليها ،

حدثنا موسى بن اسماعيل حدثنا عبد الواحد حدثنا الشيبانيّ سألت  
عبد الله بن أبي أوفى عن الرّجم فقال رجم النّبيّ (ص) فقلت أقبل  
التّور أم بعده قال لا أدري ، تابعه عليّ بن مسهر وخالد ابن  
عبد الله والمخاريّ وعبيدة بن حميد عن الشيبانيّ وقال بعضهم المائدة  
والأولّ أصحّ .

حدثنا اسماعيل بن عبد الله حدثني مالك عن نافع عن عبد الله  
بن عمر (رض) أنّه قال :

a- انّ اليهود جاءوا الى رسول الله (ص) فذكروا له أنّ رجلا منهم  
وامرأة زنيا

b- فقال لهم رسول الله (ص) ما تجدون في التّوراة في شأن الرجم

c- فقالوا نفضحهم ويجلّدون

d- قال عبد الله بن سلام كذبت انّ فيها الرّجم

e- فأتوا بالتّوراة فنشروها فوضح أحدهم يده على آية الرجم فقرأ ما  
قبلها وما بعدها

f- فقال له عبد الله بن سلام ارفع يدك فرفع يده فاذا فيها آية  
الرجم

g- قالوا صدق يا محمّد فيها آية الرّجم

فأمر بهما رسول الله (ص) فرجما

i- فرأيت الرجل يجنأ على المرأة يقيها الحجارة .

Bu.A.111. باب قوله تعالى قل فأتوا بالتوراة فاتلوها ان كنتم صادقين

حدثني ابراهيم بن المنذر قال حدثنا ابو ضمرة قال حدثنا موسى بن عقبة عن نافع عن عبد الله بن عمر

a- أن اليهود جاءوا الى النبي (ص) برجل منهم وامرأة قد زنيا

b- فقال لهم كيف تفعلون بمن زنا منكم ؟

c- قالوا نحكمهما ونضربهما

c.b- فقال ألا تجدون في التوراة الرجم

c.d- فقالوا لا نجد فيها شيئا

d- فقال لهم عبد الله بن سلام كذبتهم فأتوا بالتوراة فاتلوها ان كنتم صادقين .

e- فوضح مدراسها الذي يدرسها منهم كّفه على آية الرجم فطفق يقرأ ما دون يده وما وراءها ولا يقرأ آية الرجم فنزع يده عن آية الرجم

f- فقال ما هذه ؟

g- فلما رأوا ذلك قالوا هي آية الرجم

h-i. فأمر بهما فرجما قريبا من حيث موضع الجنائز عند المسجد فرأيت صاحبها يجني عليها يقيها الحجارة .

باب ما يجوز من تفسير التوراة وغيرها من كتب الله بالعربية  
وغیرها لقول الله تعالى قل فاتوا بالتوراة فاتلوها ان كنتم  
صادقين وقال ابن عباس اخبرني ابو سفيان بن حرب أن هرقل  
دعا ترجمانه ثم دعا بكتاب النبي (ص) فقرأه بسم الله الرحمن  
الرحيم . من محمد عبد الله ورسوله الى هرقل ويا أهل  
الكتاب تعالوا الى كلمة سواء بيننا وبينكم الآية

حدثنا مسدد حدثنا اسماعيل عن أيوب عن نافع عن ابن عمر  
(رض) قال .

a- أتى النبي (ص) برجل وامرأة من اليهود قد زنيا

b- فقال لليهود ما تصنعون بهما

c- قالوا نسخم وجوههما ونخزيهما

d- قال فاتوا بالتوراة فاتلوها ان كنتم صادقين

e- فجاءوا فقالوا لرجل ممن يرضون يا أعور اقرأ فقرأ حتى انتهى  
الى موضع منها فوضح يده عليه

f- قال ارفع يدك فرفع يده فاذا فيه آية الرجم تلوح

g- فقال يا محمد ان عليهما الرجم ولكننا نكاتمهما بيننا

h- فأمر بهما فرجما

i- فرأيتهم يجانيء عليها الحجارة .

حدثنا إسحاق بن موسى الأنصاري حدثنا معن حدثنا مالك بن أنس عن  
نافع بن عيسى عن ابن عمر

h- أن رسول الله (ص) رجم يهوديًا ويهودية

قال أبو عيسى وفي الحديث قصة وهذا حديث حسن صحيح

حدثنا هناد حدثنا شريك عن سماك بن حرب عن جابر بن سمرة

h- أن النبي (ص) رجم يهوديًا ويهودية

قال وفي الباب عن ابن عمر والبراء وجابر وابن أبي أوفى وعبد الله بن  
الحرث ابن جزء وابن عباس

قال أبو عيسى حديث جابر بن سمرة حديث حسن غريب والعمل على هذا  
عند أكثر أهل العلم قالوا إذا اختصم أهل الكتاب وترافعوا إلى حكام  
المسلمين حكموا بينهم بالكتاب والسنة وأحكام المسلمين وهو قول أحمد  
واسحاق وقال بعضهم لا يقام عليهم الحد في الزنا والقول الأول أصح.



I قال ابن اسحاق : وحدثني ابن شهاب الزهري أنه سمع رجلا من مزينة ، من أهل العلم ، يحدث سعيد بن المسيب ، أن أبا هريرة حدثهم : أن أحبار يهود اجتمعوا في بيت المدراس ، حين قدم رسول الله (ص) المدينة ، وقد زنى رجل منهم بعد احصانه بامرأة من يهود قد أحصنت ، فقالوا : ابعثوا بهذا الرجل وهذه المرأة الى محمد ، فسلوه كيف الحكم فيهما ، ولله الحكم عليهما ، فان عمل فيهما بعلمكم من التَّجْبِيَةِ - والتَّجْبِيَةِ : الجلد بحبل من ليف مطلق بقار ، ثم تسود وجوههما ، ثم يحملان على حمارين ، وتجعل وجوههما من قبل أدبار الحمارين - فاتبعوه ، فانما هو ملك ، وصدقوه ، وان هو حكم فيهما بالرجم ، فانه نبي ، فاحذروه على ما في أيديكم أن يسلبكموه .

II

a- فأتوه ، فقالوا : يا محمد ، هذا رجل قد زنى بعد احصانه بامرأة قد أحصنت ، فاحكم فيهما ، فقد وليتاك الحكم فيهما .

a.b- فمشى رسول الله (ص) حتى أتى أحبارهم في بيت المدراس ، فقال : يا معشر يهود ، أخرجوا الى علماءكم . فأخرجوا له عبد الله ابن صوريا .

قال ابن اسحاق : وقد حدثني بعض بني قريظة : أنهم قد أخرجوا اليه يوشع ، مع ابن صوريا ، أبا ياسر بن أخطب ، ووهب بن يهودا فقالوا : هؤلاء علماءونا .

فسألهم رسول الله (ص) ، حتى حصل أمرهم ، الى أن قالوا لعبد الله ابن صوريا : هذا أعلم من بقى بالتوراة .

III فخلا به رسول الله (ص) ، وكان غلاما شابا من أحدثهم سنا ، فألظبه رسول الله (ص) المسألة ، يقول له : يا ابن صوريا ، أنشدك الله وأذكرك بأيامه عند بني اسرائيل ، هل تعلم أن الله حكم فيمن زنى بعد احصانه بالرجم في التوراة ؟

قال : اللهم نعم ، أما والله يا أبا القاسم ، انهم ليحرفون أنك لنبي مرسل ولكنهم يحسدونك .

قال : فخرج رسول الله (ص) ، فأمر بهما فرجا عند باب مسجده في بني غنم بن مالك بن النجار . ثم كفر بعد ذلك ابن صوريا ، وجحد نبوة رسول الله (ص) .

IV قال ابن اسحاق : فأنزل الله تعالى فيهم : " يا أيها الرسول لا يحزنك الذين يسارعون في الكفر ، من الذين قالوا آمنا بأفواههم ولم تؤمن قلوبهم ومن الذين هادوا سماعين للكذب سماعين لقوم آخرين لم يأتوك " .  
أي الذين بحثوا منهم من بحثوا وتخلّفوا ، وأمرهم بما أمرهم به من تحريف الحكم عن مواضعه . ثم قال : " يحرفون الكلم من بعد مواضعه ، يقولون ان أوتيتم هذا فخذوه ، وان لم تؤتوه " ، أي الرجم " فاحذروا " ... الى آخر القصة .

قال ابن اسحاق : وحدثني محمد بن طلحة بن يزيد بن ركانة ،  
عن اسماعيل بن ابراهيم ، عن ابن عباس ، قال :  
missing. a-g

h- أمر رسول الله ( ص ) برجمهما ، فرجما بباب مسجده ،

i- فلما وجد اليهودي من الحجارة قام الى صاحبتة ، فجنأ عليها ،  
يقيها من الحجارة ، حتى قتلا جميعا .

j- قال : وكان ذلك مما صنع الله لرسوله ( ص ) في تحقيق الزنا منهما .

قال ابن اسحاق : وحدثني صالح بن كيسان ، عن نافع مولى عبد الله بن عمر ،  
عن عبد الله بن عمر ، قال :

d- لما حَكَّموا رسول الله (ص) فيهما ، دعاهم بالتوراة

e- وجلس خبر منهم يتلوها ، وقد وضع يده على آية الرجم

f- قال : فضرب عبد الله بن سلام يد الخبر ، ثم قال : هذه يا نبيّ الله  
آية الرّجم ، يا بني أن يتلوها عليك

f.a- فقال لهم رسول الله (ص) : ويحكم يا معشر يهود ما دعاكم الى ترك  
حكم الله وهو بأيديكم ؟

g- قال : فقالوا : أما والله انه قد كان فينا يعمل به

g.a- حتى زنى رجل منا بعد احصائه ، من بيوت الملوك وأهل الشرف ،  
فمنعه الملك من الرجم ، ثم زنى رجل بعده ، فأراد أن يرجمه ، فقالوا :  
لا والله ، حتى ترجم فلانا ، فلما قالوا له ذلك ، اجتمعوا فأصلحوا  
أمرهم على التجبية ، وأماتوا ذكر الرّجم والعمل به .

g.b- قال : فقال رسول الله (ص) : فأننا أول من أحيا أمر الله وكتابه  
وعمل به .

III

h- ثم أمر بهما فرجما عند باب مسجده

i- قال عبد الله بن عمر : فكنت فيمن رجمهما .

قال ابن اسحاق : وحدثني داود بن الحصين عن عكرمة ، عن ابن عباس :  
 أن الآيات من المائدة التي قال الله فيها : " فاحكم بينهم أو أعرض  
 عنهم وإن تعرض عنهم فلن يضرك شئاً " . وإن حكمت فاحكم بينهم  
 بالقسط إن الله يحب المقسطين " ، إنما أنزلت في الدية بين بني  
 النضير وبين بني قريظة ، وذلك أن قتلى بني النضير ، وكان لهم شرف ،  
 يؤدّون الدية كاملة ، وأن بني قريظة ( كانوا ) يؤدّون نصف الدية ،  
 فتحاكموا في ذلك إلى رسول الله ( ص ) ، فأُنزل الله ذلك فيهم ، فحطهم  
 رسول الله ( ص ) على الحق في ذلك ، فجعل الدية سواءً .  
 قال ابن اسحاق : فالله أعلم أي ذلك كان .

عن سعيد بن المسيّب :

a- أن رجلا من أسلم جاء الى أبي بكر الصديق ، فقال له : انّ الآخر زنى ، فقال له أبو بكر : هل ذكرت هذا لأجد غيري ؟ فقال له : لا ، فقال له أبو بكر : فتب الى الله واستتر بستر الله ، فان الله يقبل التوبة عن عباده ، فلم تقرره نفسه ، حتى أتى عمر بن الخطاب ، فقال له مثل ما قال لأبي بكر ، فقال له عمر مثل ما قال له أبو بكر

فلم تقرره نفسه حتى جاء الى رسول الله ( ص )

b- فقال له : انّ الآخر زنى فقال سعيد : فأعرض عنه رسول الله ( ص ) ثلاث مرات ، كلّ ذلك يعرض عنه رسول الله ( ص ) ، حتى اذا أكثر عليه

c- بعث رسول الله ( ص ) الى أهله فقال : " أيشتكى أم به جنة ؟ " فقالوا : يا رسول الله : والله انه لصحيح ، فقال رسول الله ( ص ) : " أبكر أم ثيب ؟ " فقالوا : بل ثيب يا رسول الله

d- فأمر به رسول الله ( ص ) فرجم .

Bu.B.I باب رجم المحصن وقال الحسن من زنى بأخته حدّه حدّ الزانى

حدثنا محمد بن مقاتل أخبرنا عبد الله أخبرنا يونس عن ابن شهاب  
حدثنى ابوسلمة بن عبد الرحمن عن جابر بن عبد الله الأنصارى

missing. a-

b- أن رجلا من أسلم أتى رسول الله (ص) فحدثه أنه قد زنى  
فشهد على نفسه أربع شهادات

missing. c-

d- فأمر به رسول الله (ص) فرجم

e- وكان قد أحصن

باب لا يَرجم المجنون والمجنونة وقال عليّ لعمر أما علمت أنّ  
القلم رفع عن المجنون حتى يفيق وعن الصبيّ حتى يدرك وعن  
النائم حتى يستيقظ

حدثنا يحيى بن بكير حدثنا الليث عن عقيل عن ابن شهاب  
عن أبي سلمة وسعيد بن المسيّب عن أبي هريرة (رض) قال

a- missing.

b- أتى رجل رسول الله (ص) وهو في المسجد فناداه فقال يا رسول  
الله أتى زنيّة فأعرض عنه حتى ردّد عليه أربع مرّات فلما شهد  
على نفسه أربع شهادات

c- دعاه النبيّ (ص) فقال أبك جنون قال لا قال فهل أحصنت  
قال نعم

d- فقال النبيّ (ص) اذهبوا به فارجموه

e- missing.

f- قال ابن شهاب فأخبرني من سمع جابر بن عبد الله قال فكنت فيمن  
رجمه فرجمناه بالصّلّي فلما ادلّقتهم الحجارة هرب فأدركناه  
بالحرّة فرجمناه



حدثنا محمود بن غيلان حدثنا عبد الرزاق أخبرنا معمر عن  
الزهرى عن أبي سلمة عن جابر

missing.

a-

أن رجلا من أسلم جاء النبي (ص) فاعترف بالزنى فأعرض عنه النبي  
(ص) حتى شهد على نفسه أربع مرّات

b-

فقال له النبي (ص) أبك جنون قال لا قال أحصنت قال نعم

c-

فأمر به فرجم بالصلى

d-

e-

فلما أذلقته الحجارة فرّ فأدرك فرجم حتى مات

f-

فقال له النبي (ص) خيرا وصلى عليه

g-

ولم يقل يونس وابن جريج عن الزهرى فصلى عليه .

g.a-

Bu.B.IV باب هل يقول الامام للمقرّلعك لمست أو غمرت

حدثنا عبد الله بن محمد الجعفيّ حدثنا وهب بن جرير حدثنا  
ابى قال سمعت يعلى بن حكيم عن عكرمة عن ابن عباس (رض)  
قال

a- missing.

b- لما أتى ماعز بن مالك النبيّ (ص)

c- قال له لعك قبلت أو غمرت أو نظرت قال لا يا رسول الله قال  
أنكتها لا يكتي.

d- قال فعند ذلك أمر برجمه .

e- missing

f- missing

g- missing

g.a- missing

حدثنا سعيد بن غفير قال حدثني الليث حدثني عبد الرحمن بن خالد عن ابن شهاب عن ابن المسيب وأبي سلمة أن أبا هريرة قال

missing. a-

أتى رسول الله (ص) رجل من الناس وهو في المسجد فناداه يا رسول الله أتى زنيث يريد نفسه فأعرض عنه النبي (ص) فتنحى لشق وجهه الذي أعرض قبله فقال يا رسول الله أتى زنيث فأعرض عنه فجاء لشق وجه النبي (ص) الذي أعرض عنه فلما شهد على نفسه أربع شهادات

دعاه النبي (ص) فقال أبك جنون قال لا يا رسول الله فقال أحصنت قال نعم يا رسول الله

d- قال اذهبوا به فارجموه

missing. e-

f- قال ابن شهاب أخبرني من سمع جابرا يقول فكنت فيمن رجمه فرجمناه بالمصلى فلما أذلقته الحجارة جمر حتى أدركناه بالحرة فرجمناه .

missing. g-

missing. g.a-

باب الطلاق فى الاغلاق ، والكفر ، والسكران والمجنون وأمرهما  
والغلط والنسيان فى الطلاق والشرك وغيره ....

حدثنا أصبح : أخبرنى ابن وهب عن يونس عن ابن شهاب  
قال أخبرنى أبو سلمة بن عبد الرحمن عن جابر أن رجلاً  
من أسلم أتى النبى (ص) وهو فى المسجد فقال :  
أنه قد زنى .

فأعرض عنه . فتنحى لشقه الذى أعرض فشهد على نفسه اريح  
شهادات .

فدعاه فقال : هل بك جنون ؟ هل أحصنت ؟

قال : نعم

فأمر به أن يرجم بالمصى .

فلما أذلقته الحجارة جمر حتى أدرك بالحرة فقتل .

missing. g.-

missing. g.a-

حدثنا أبو اليمان أخبرنا شعيب عن الزهري قال : أخبرني أبو سلمة بن عبد الرحمن وسعيد بن المسيب أن أبا هريرة قال :

b- أتى رجل من أسلم رسول الله (ص) وهو في المسجد فناداه فقال : يا رسول الله إن الآخر قد زنى يعنى نفسه . فأعرض عنه . فتنحى لشق وجهه الذى أعرض قبله . قال : يا رسول الله إن الآخر قد زنى فأعرض عنه . فتنحى لشق وجهه الذى أعرض قبله فقال له ذلك .

c- فأعرض عنه . فتنحى له الرابعة . فلما شهد على نفسه أربع شهادات دعاه . فقال : هل بك جنون ؟ قال : لا .

d- فقال النبي (ص) اذهبوا به فارجموه .  
e- وكان قد أحصن .

f- وعن الزهري قال : أخبرني من سمع جابر بن عبد الله الانصاري قال : كنت فيمن رجمه . فرجناه بالمصلى بالمدينة فلما أذلقته الحجارة جمر حتى ادركناه بالحرة فرجناه حتى مات .

باب من حكم في المسجد حتى اذا اتى على حدّ أمر أن يخرج  
من المسجد فيقام وقال عمر أخرجاه من المسجد ويذكر عن عليّ نحوه

حدثنا يحيى بن بكير حدثنا الليث عن عقيل عن ابن شهاب عن ابي  
سلمة وسعيد بن المسيّب عن ابي هريرة قال

b- اتى رجل رسول الله ( ص ) وهو في المسجد فناداه فقال يا رسول الله  
اننى زنيت فأعرض عني فلعنّا شهد على نفسه اربعاً

c- قال أبك جنون قال لا

d- قال اذهبوا به فارجموه

e- قال ابن شهاب فأخبرني من سمع جابر بن عبد الله قال كنت فيمن رجمه  
بالمصلّى

f- رواه يونس ومعمار وابن جريج عن الزهريّ عن ابي سلمة عن جابر  
عن النبيّ ( ص ) في الرجم .

حدثنا أبو كريب حدثنا عبدة بن سليمان عن محمد بن عمرو حدثنا  
أبو سلمة عن أبي هريرة

missing. a-

b- قال جاء ما عزم الأسلمي الى رسول الله (ص) فقال انه قد زنى  
فأعرض عنه ثم جاء من شقه الآخر فقال يا رسول الله انه قد زنى  
فأعرض عنه ثم جاء من شقه الآخر فقال يا رسول الله انه قد زنى  
missing. c-

d+ f- فأمر به في الزابعة فأخرج الى الحرة فرجم بالحجارة  
missing. e+g+g.a-

h-j فلما وجد من الحجارة فريشتد حتى مرّ برجل معه لحي جمل  
فضربه به وضربه الناس حتى مات فذكروا ذلك لرسول الله (ص) أنه  
فرحين وجد من الحجارة ومن الموت فقال رسول الله (ص) هلا تركتموه

قال أبو عيسى هذا حديث حسن وقد روى من غير وجه عن أبي هريرة وروى  
هذا الحديث عن الزهري عن أبي سلمة عن جابر بن عبد الله عن النبي  
(ص) نحو هذا

cf.) حدثنا بذلك الحسن بن عليّ حدثنا عبد الرزاق أنبأنا معمر عن الزهري  
عن أبي سلمة بن عبد الرحمن عن جابر بن عبد الله

أن رجلا من أسلم جاء الى النبي (ص) فاعترف بالزنا فأعرض عنه ثم  
اعترف فأعرض عنه حتى شهد على نفسه أربع شهادات

فقال النبي (ص) أبك جنون قال لا قال أحصنت قال نعم

قال فأمر به فرجم بالمصلى

فلما أذلقته الحجارة فرّ فأدرك فرجم حتى مات

فقال له رسول الله (ص) خيرا ولم يصل عليه

قال أبو عيسى هذا حديث حسن صحيح والحمل على هذا الحديث عند  
بعض أهل العلم أن المعترف بالزنا اذا أقر على نفسه أربع مرات أقيم عليه  
الحدّ وهو قول أحمد وإسحاق وقال بعض أهل العلم اذا أقر على نفسه مرة  
أقيم عليه الحدّ وهو قول مالك بن أنس والشافعي وحجة من قال هذا القول  
حديث أبي هريرة وزيد بن خالد أن رجلين اختصما الى رسول الله (ص)  
فقال أحدهما يا رسول الله ان ابني زنى بامرأة هذا الحديث بطوله وقال  
النبي (ص) اغد يا أنيس على امرأة هذا فان اعترفت فارجمها ولم يقل فان  
اعترفت أربع مرات ( )

عن مالك : عن ابن شهاب ، أنه أخبره ، أن رجلا اعترف على نفسه بالزنا على عهد رسول الله ( ص ) وشهد على نفسه أربع مرات ، فأمر به رسول الله ( ص ) فرجم ، قال ابن شهاب : فمن أجل ذلك يؤخذ الرجل باعترافه على نفسه .



- a- عن زيد بن طلحة ، عن عبد الله بن أبي مليكة : أنه أخبره أن امرأة جاءت إلى رسول الله (ص) ، فأخبرته أنها زنت ، وهي حامل ،
- b- فقال لها رسول الله (ص) : " اذهبي حتى تضعي " ، فلما وضعت جاءته
- c- فقال لها رسول الله (ص) : " اذهبي حتى ترضعيه " ، فلما أرضعته جاءته
- d-e فقال : " اذهبي فاستودعيه " قال : فاستودعته ثم جاءت
- f- فأمر بها فرجمت .

حدثنا محمد بن العلاء الهذلي حدثنا يحيى بن يعلى ( وهو ابن الحارث المحاربي ) عن غيلان ( وهو ابن جامع المحاربي ) عن علقمة بن مرثد عن سليمان بن بريدة عن أبيه

1. قال جاء ماعز بن مالك الى النبي ( ص ) فقال يا رسول الله طهرني
2. فقال ويحك ارجع فاستغفر الله وتب اليه
3. قال فرجع غير بعيد ثم جاء فقال يا رسول الله طهرني
4. فقال رسول الله ( ص ) ويحك ارجع فاستغفر الله وتب اليه
5. قال فرجع غير بعيد . ثم جاء فقال يا رسول الله طهرني
6. فقال النبي ( ص ) مثل ذلك
7. حتى اذا كانت الرابعة قال له رسول الله ( ص ) فيم أطهرك
8. فقال من الزنى
9. فسأل رسول الله ( ص ) أبه جنون
10. فاخبر أنه ليس بجنون
11. فقال أشرب خمرا
12. فقام رجل فاستنكه فلم يجد منه ريح خمر
13. قال فقال رسول الله ( ص ) أزنيت
14. فقال نعم
15. فامر به فرجم
16. فكان الناس فيه فرقتين قائل يقول لقد هلك لقد احاطت به خطيئته
17. وقائل يقول ما توبة افضل من توبة ماعز أنه جاء الى النبي ( ص ) فوضح يده في يده ثم قال اقتلني بالحجارة
18. قال فلبثوا بذلك يومين أو ثلاثة ثم جاء رسول الله ( ص ) وهم جلوس فسلم ثم جلس فقال استغفروا لماعز بن مالك
19. قال فقالوا غفر الله لماعز بن مالك
20. قال فقال رسول الله ( ص ) لقد تاب توبة لو قسمت بين أمة لوسعتهم

Mu.C.I.B.

a- قال ثم جاءت امرأة من غامد من الازد فقالت يا رسول الله طهرني

a/b- فقال ويحك ارجعي فاستغفري الله وتوبى اليه

a/c- فقالت اراك تريد ان ترددني كما رددت ماعز بن مالك

a/d--+a/e قال وما ذاك قالت انها حبل من الزنى

a/f- فقال انت

a/g- قالت نعم

- b- فقال لها حتى تضعي ما في بطنك
- b/c- قال فكفلها رجل من الانصار حتى وضعت
- b/d- قال فأتى النبي (ص) فقال قد وضعت الغامدية
- c- فقال اذا لا ترجمها وتدع ولدها صغيرا ليس له من يرضعه
- c/d- فقام رجل من الانصار فقال الى رضاعه يا نبي الله  
missing. d-e
- f- قال فرجمها

- وحدثنا ابو بكر بن ابي شيبة حدثنا عبد الله بن نعيم حدثنا محمد بن عبد الله بن نعيم ( وتقاربا في لفظ الحديث ) حدثنا ابي حدثنا بشير بن المهاجر حدثنا عبد الله بن بريدة عن ابيه أن ماعز ابن مالك الاسلمى اتى رسول الله ( ص ) فقال يا رسول الله انى قد ظلمت نفسى وزيت واتى اريد ان تطهرنى
1. فردة
2. فلما كان من الغد اتاه فقال يا رسول الله انى قد زيت
3. فردة الثانية
4. فارسل رسول الله ( ص ) الى قومه فقال أتعلمون بعقله بأسا تنكرون منه
5. شيئا
6. فقالوا ما نعلمه الا وفى العقل من صالحينا فيما نرى
7. فاتاه الثالثة فارسل اليهم ايضا فسأل عنه
8. فاخبروه انه لا بأس به ولا بعقله
9. فلما كان الرابعة حفر له حفرة ثم امر به فرجم

- a- قال فجاءت الغامدية فقالت يا رسول الله انى قد زيت فطهرنى
- a/b- واته ردها
- a/c- فلما كان الغد قالت يا رسول الله لم تردنى لعلك ان تردنى كما رددت ماعزا فوالله انى لحبلى
- a/d- missing.
- a/e- missing.
- a/f- missing.
- a/g- missing.
- b- قال اما لا فاذهبى حتى تلدى
- b/d- فلما ولدت اتته بالصبي فى خرقة قالت هذا قد ولدته
- c- قال اذهبى فارضعيه حتى تطفيه
- c/d- missing.

- d- فلما فطمته اتته بالصبي في يده كسرة خبز فقالت هذا يا نبي الله قد فطمته وقد أكل الطعام
- e- فدفع الصبي الى رجل من المسلمين ثم امر بها فحفر لها الى صدرها
- f- وامر الناس فرجموها
- g- فيقبل خالد بن الوليد بحجر فرمى رأسها فتنضح الدم على وجه خالد فسبها
- h- فسمع نبي الله (ص) سبه اياها فقال مهلا يا خالد فوا الذي نفسى بيده لقد تابت توبة لو تابها صاحب مكس لخفر له
- i- ثم امر بها فصلى عليها ودفنت

حدثني أبو غسان مالك بن عبد الواحد السمعاني حدثنا معاذ ( يعني  
ابن هشام ) حدثني أبي عن يحيى بن أبي كثير حدثني أبو قلابة  
أن أبا المهلب حدثه عن عمران بن حصين

a- أن امرأة من جهينة أتت نبي الله ( ص ) وهي حبلى من الزنى فقالت يا  
نبي الله أصبت حسدا فأقمه علي

b- فدعا نبي الله ( ص ) وليها فقال احسن اليها فاذا وضعت فائتي بها ففعل

c- missing.

d- missing.

e- missing.

f- missing.

g- فأمر بها نبي الله ( ص ) فشكت عليها ثيابها ثم أمر بها فرجمت

h- ثم صلى عليها

i- فقال له عمر تصلي عليها يا نبي الله وقد زنت

j- فقال لقد تابت توبة لو قسمت بين سبعين من أهل المدينة لوسعتهم وهل  
وجدت توبة أفضل من أن جادت بنفسها لله تعالى

وحدثنا أبو بكر بن أبي شيبة حدثنا عفان بن مسلم حدثنا أبان العطار  
حدثنا يحيى بن أبي كثير بهذا الاسناد مثله .

حدثنا الحسن ابن عليّ حدثنا عبد الرزاق حدثنا معمر عن يحيى بن  
ابى كثير عن أبى قلابسة عن أبى المهلب عن عمران بن حصين

a- أن امرأة من جهينة اعترفت عند النبيّ (ص) بالزنا فقالت انى حبلى

b- فدعا النبيّ (ص) وليها فقال أحسن اليها فاذا وضعت حبلها فأخبرنى  
ففعل

c- missing.

d- missing.

e- missing.

f- missing.

g- فأمر بها فشدت عليها ثيابها ثم أمر برجمها فرجمت

h- ثم صلى عليها

i- فقال له عمر ابن الخطاب يا رسول الله رجمتها ثم صلى عليها

j- فقال لقد تابت توبة لو قسمت بين سبعين من أهل المدينة لوسعتهم  
وهل وجدت شيئا أفضل من أن جادت بنفسها لله

قال ابو عيسى هذا حديث حسن صحيح

عن أبي هريرة وزيد بن خالد الجهني

a- أن رجلين اختصما إلى رسول الله (ص) ، فقال أحدهما : يا رسول الله ، اقض بيننا بكتاب الله وقال الآخر ، وهو أفقرهما : أجل يا رسول الله ، فاقض بيننا بكتاب الله ، وأذن لي في أن أتكلم ، فقال : " تكلم "

b- قال : ان ابني كان عسيفا على هذا فزنى بامرأته ، فأخبرني أن على ابني الرجم ، فافتديت منه بمائة شاة وجارية لي ، ثم اني سألت أهل العلم فأخبروني : أن ما على ابني جلد مائة وتغريب عام ، وأخبروني : أنما الرجم على امرأته

c- فقال رسول الله (ص) : " أما والذي نفسي بيده لأقضي بينكما بكتاب الله "

d- أما غنمك وجاريته فردد عليك

e- وجلد ابنه مائة ، وغربه عاما

f- وأمر أنيسا الأسلمي أن يأتي امرأة الآخر ، فان اعترفت رجمها

g- فاعترفت فرجمها • قال مالك : والعسيف الأجير •



حدثنا علي بن عبد الله حدثنا سفيان قال حفظناه من فسي  
الزهرى قال اخبرني عبيد الله أنه سمع ابا هريرة وزيد بن خالد  
قالا

a- كُتِبَ عند النبي (ص) فقام رجل فقال انشذك الله الا ما قضيت  
بيننا بكتاب الله فقام خصمه وكان أفقه منه فقال اقض بيننا بكتاب  
الله واأذن لي قال قل

b- قال ان ابني كان عسيفا على هذا فزنى بامراته فافتديت منه بمائة  
شاة وخادم ثم سألت رجالا من أهل العلم فأخبروني أن على ابني  
جلد مائة وتغريب عام وعلى امراته الرجم

c- فقال النبي (ص) والذي نفسي بيده لأقضين بينكما بكتاب الله جل  
ذكره

d- المائة شاة والخادم ردّ عليك

e- وعلى ابنك جلد مائة وتغريب عام

f- واغد يا أنيس على امرأة هذا فان اعترفت فارجمها فغدا عليها فاعترفت  
فرجمها

g- (Malik's gloss)

h- قلت لسفيان لم يقل فأخبروني ان على ابني الرجم فقال أشك فيها  
من الزهرى فرمما قتلها ورمما سككت.

حدثنا عاصم بن عليّ حدثنا ابن ابي ذئب عن الزهري عن عبيد الله  
عن ابي هريرة وزيد بن خالد

a- ان رجلا من الأعراب جاء الى النبيّ (ص) وهو جالس فقال يا رسول  
الله اقض بكتاب الله

فقام خصمه فقال صدق اقض له يا رسول الله بكتاب الله

b- ان ابني كان عسيقا على هذا فزني بامرأته فأخبروني ان على ابني الرجم  
فافتديت بمائة من الغنم ووليدة ثم سألت أهل العلم فزعموا أن ما  
على ابني جلد مائة وتغريب عام

c- فقال والذي نفسي بيده لأقضيّن بينكما بكتاب الله

d- أما الغنم والوليدة فردّ عليك

e- وعلى ابنك جلد مائة وتغريب عام

f- وأما انت يا أنيس فاغد على امرأة هذا فارجمها فغدا انيس فرجمها •

missing. g-

missing. h-

- حدثنا قتيبة بن سعيد ، حدثنا ليث عن ابن شهاب عن عبيد  
الله بن عبد الله بن عتبة بن مسعود عن ابي هريرة وزيد  
بن خالد الجهني (رض) أنها قالا :  
a- ان رجلا من الأعراب أتى رسول الله (ص) فقال يا رسول  
الله انشدك الله الا قضيت لي بكتاب الله .  
فقال الخصم الآخر وهو أفقه منه : نعم ، فاقضى بيننا بكتاب  
الله وائذن لي .  
فقال رسول الله (ص) : قل .  
b- قال : ان ابني كان عسيفا على هذا فزني بامرأته واني أخبرت  
أن على ابني الرجم فاقتديت منه بمائة شاة ووليدة فسألت  
أهل العلم فاخبروني أنما على ابني جلد مائة وتغريب عام وأن  
على امرأة هذا الرجم .  
c- فقال رسول الله (ص) : والذي نفسي بيده لأقضين بينكما  
بكتاب الله .  
d- الوليدة والغنم رد .  
e- وعلى ابنك جلد مائة وتغريب عام .  
f- اغد يا أنيس الى امرأة هذا فان اعترفت فارجمها .  
قال : فغدا عليها فاعترفت .  
i- فأمر بها رسول الله (ص) فرجمت .

cf.) حدثنا زهير بن حرب حدثنا يعقوب بن ابراهيم حدثنا ابي عن صالح  
عن ابن شهاب أن عبيد الله بن عبد الله أخبره أن ابا هريرة وزيد  
بن خالد أخبراه

أن رجلين اختصما الى النبي (ص)

وحدثنا ابو اليمان اخبرنا شعيب عن الزهري اخبرني عبيد الله بن  
عبد الله بن عتبة بن مسعود أن ابا هريرة قال (

a- بينما نحن عند رسول الله (ص) اذ قام رجل من الأعراب  
فقال يا رسول الله افض لي بكتاب الله فقام خصمه فقال صدق .

يا رسول الله افض له بكتاب الله واذن لي  
فقال له رسول الله صلى الله عليه وسلم قل

b- فقال ان ابني كان عسيفا على هذا، والعسيف الاجير، فزني بامراته  
فاخبروني ان علي ابني الرجم، فافتديت منه بمئة من الغنم ووليدة  
ثم سألت اهل العلم أن علي <sup>ماخبرني</sup> امراته الرجم وانما علي ابني جلد مئة وتغريب  
عام .

c- فقال : والذي نفسي بيده لا قضين بينكما بكتاب الله

d- اما الوليدة والغنم فردوها

e- واما ابنك فعليه جلد مئة وتغريب عام

f- واما انت يا أنيس، لرجل من أسلم، فاغد على امرأة هذا فان اعترفت

فارجمها

فغدا عليها أنيس فاعترفت فرجمها .

حدثنا نصر بن عليّ وغير واحد حدثنا سفيان بن عيينة عن الزّهرى  
عن عبيد الله بن عبد الله بن عتبة سمعه من أبى هريرة وزيد  
بن خالد وشبل

a- أنهم كانوا عند النّبيّ (ص) فأتاه رجلان يختصمان فقام اليه أحدهما  
وقال أنشدك الله يا رسول الله لما قضيت بيننا بكتاب الله فقال خصمه  
وكان أفقه منه أجل يا رسول الله اقض بيننا بكتاب الله واذن لى  
فأتكلم

b- انّ ابني كان عسيفا على هذا فزنا بامراته فأخبروني أنّ على  
ابني الرّجم ففديت منه بمائة شاة وخادم ثمّ لقيت ناسا من أهل العلم  
فزعموا أنّ على ابني جلد مائة وتغريب عام وانما الرّجم على امرأة هذا

c- فقال النّبيّ (ص) والذي نفسى بيده لأقضين بينكما بكتاب الله

d- المائة شاة والخادم ردّ عليك

e- وعلى ابنك جلد مائة وتغريب عام

f- واغد يا أنيس على امرأة هذا فان اعترفت فارجمها فغدا عليها  
فاعترفت فرجمها

) حدثنا اسحاق بن موسى الأنصارى حدثنا معن حدثنا مالك عن  
ابن شهاب عن عبيد الله ابن عبد الله عن أبى هريرة وزيد بن خالد  
الجهنى عن النّبيّ (ص) نحوه بمعناه .

حدثنا قتيبة حدثنا الليث عن ابن شهاب باسناده نحو حديث مالك  
بمعناه قال وفي الباب عن أبى بكر وعادة بن الصامت وأبى هريرة وأبى  
سعيد وابن عباس وجابر بن سمره وهزال ومريدة وسلمة بن المحبق  
وأبى برزة وعمران بن حصين

قال أبو عيسى حديث أبى هريرة وزيد بن خالد حديث حسن صحيح . (

عن عبد الله بن عباس ، أنه قال : سمعت عمر بن الخطاب

يقول : الرّجم في كتاب الله حقّ على من زنى من الرجال والنساء  
إذا أحصن ، إذا قامت البينة أو كان الحبل أو الاعتراف .

عن يحيى بن سعيد بن المسيّب

a- أنه سمعه يقول : لما صدر عمر بن الخطاب من منى ، أناخ بالأبطح ، ثم كرم كومة بطحاء ، ثم طرح رداءه ، واستلقى ، ثم مدّ يديه الى السماء فقال : اللهم كبرت سنّي ، وضعفت قوتي ، وانتشرت رعيتي فاقبضني اليك غير مضّيح ولا مفرط . ثم قدم المدينة

b- فخطب الناس فقال : أيها الناس ، قد سنّت لكم السنن ، وفرضت لكم الفرائض ، وتركتم على الواضحة ، الا أن تضلّوا بالناس يمينا وشمالا ،  
c- وضرب باحدى يديه على الأخرى

d- ثم قال : اياكم أن تهلكوا عن آية الرّجم ، يقول قائل : لا نجد حدّين  
e- في كتاب الله ، فقد رجم رسول الله ( ص ) ورجمنا ، والذي نفسي بيده لولا أن يقول الناس : زاد عمر بن الخطاب في كتاب الله تعالى ،  
لكتبتها : الشيخ والشيخة فارجموهما ألبتة ، فانا قد قرأناها

f- قال سعيد بن المسيّب : فما انسلخ ذو الحجة حتى قتل عمر رحمه الله

f.a- قال مالك : قوله : الشيخ والشيخة يعني : الثيّب والثيّبة ، فارجموهما ألبتة .

حدثنا عليّ ابن عبد الله حدثنا سفيان عن الزّهرىّ عن عبيد الله عن  
ابن عباس (رض) قال

missing. a-b.

قال عمر لقد خشيت أن يطول بالناس زمان حتى يقول قائل لا نجد  
الرجم في كتاب الله فيضللوا بترك فريضة انزلها الله

missing. c--f

g- ألا وإنّ الرّجم حق على من زنى وقد أحصن اذا قامت البيّنة أو  
كان الحبل أو الاعتراف

h- قال سفيان كذا حفظت ألا وقد رجم رسول الله (ص) ورجمنا بعده



حدثنا عبد العزيز بن عبد الله حدثني إبراهيم بن سعد عن صالح  
عن ابن شهاب عن عبيد الله بن عبد الله بن عتبة بن مسعود عن  
ابن عباس

Part I

قال كنت أقرى رجلا من المهاجرين منهم عبد الرحمان بن عوف فبينما  
أنا في منزله بمنى وهو عند عمر بن الخطاب في آخر حجة  
حجها اذ رجع الى عبد الرحمان فقال لورأيت رجلا أتى أمير المؤمنين  
اليوم فقال يا أمير المؤمنين هل لك في فلان يقول لو قد مات  
عمر لقد بايعت فلانا فوالله ما كانت بيعة ابى بكر الا فلتة فتت  
فغضب عمر ثم قال اتى ان شاء الله لقائم العشية في الناس فمحدثهم  
هؤلاء الذين يريدون أن يغيثوهم أمورهم قال عبد الرحمان فقلت  
يا أمير المؤمنين لا تفعل فان الموسم يجمع رعا الناس وغفاهم فأتهم  
هم الذين يغلبون على قريك حين تقوم في الناس وأنا أخشى أن  
تقوم فتقول مقالة يطيرها عنك كل مطير وأن لا يعوها وأن لا يضعوها  
على مواضعها فأمهل حتى تقدم المدينة فأتها دار الهجرة والسنة  
فتخلص بأهل الفقه وأشراف الناس فتقول ما قلت متكننا فيعى أهل  
العلم مقاتلتك ويضعونها على مواضعها فقال عمر أما والله ان شاء  
الله لأقومن بذلك أول مقام أقومه بالمدينة

قال ابن عباس فقد منا المدينة في عقب ذى الحجة فلما كان يوم  
الجمعة عجلت الرواح حين زاغت الشمس حتى أجده سعيد بن زيد بن  
عمرو بن نفيل جالسا الى ركن المنبر فجلست حذوه تسمع ركبتي  
ركبته فلم أنشب أن خرج عمر بن الخطاب فلما رأيته مقبلا قلت  
لسعيد بن زيد بن عمرو بن نفيل ليقولن العشية مقالة لم يقلها  
منذ استخلف فأذكر على وقال ما عسيت أن يقول ما لم يقل قبله  
فجلس عمر على المنبر فلما سكت المؤذنون قام فأثنى على الله بما  
هو أهله ثم قال

Part II

أما بعد فأتى قائل لكم مقالة قد قدر لي أن أقولها لا أدرى  
لعلها بين يدي أجلى فمن عقلها ووعاها فليحدث بها حيث انتهت  
به راحلته ومن خشى أن لا يعقلها فلا أحل لأحد أن يكذب على

Part III

- a- ان الله بعث محمدا (ص) بالحق وأنزل عليه الكتاب فكان مما أنزل  
الله آية الرجم فقرأناها وعقلناها ووعاها فلذا رجم رسول الله (ص)  
b- ورجعنا بعده / فأخشى ان طال بالناس زمان أن يقول قائل والله ما  
نجد آية الرجم في كتاب الله فيضلوا بترك فريضة أنزلها الله

c- والترجم في كتاب الله حق على من زنى اذا أحسن من الرجال والنساء اذا قامت البينة أو كان الحبل أو الاعتراف

#### Part IV

ثم اتا كنا نقرأ فيما نقرأ من كتاب الله أن لا ترغبوا عن آبائكم فإنه كفر بكم أن ترغبوا عن آبائكم أو أن كفر بكم أن ترغبوا عن آبائكم

#### Part V

ألا ثم أن رسول الله (ص) قال لا تطروني كما أطرى عيسى ابن مريم وقولوا عبد الله ورسوله

#### Part VI

ثم انه بلغني أن قائلاً منكم يقول والله لو مات عمر بايعت فلانا فلا يخترن امرء أن يقول انما كانت بيعة ابي بكر فلتة وتمت ألا وانها قد كانت كذلك ولكن الله وقى شرها وليس منكم من تقطع الأعناق اليه مثل ابي بكر من بايع رجلاً عن غير مشورة من المسلمين فلا يتابع هو ولا الذي بايعه تنجرة أن يقتلا وأنه قد كان من خيرنا حين توفى الله نبيه (ص) إلا أن الأنصار خالفونا واجتمعوا بأسرهم في سقيفة بني ساعدة وخالف عنا على والزبير ومن معهم واجتمع المهاجرون الى ابي بكر فقلت لابي بكر انطلق بنا الى اخواننا هؤلاء من الأنصار فانطلقنا نريدهم فلما دنونا منهم لقينا رجلاً منهم صالحاً فذكرنا ما تعالى عليه القوم فقالا أين تريدون يا معشر المهاجرين فقلنا نريد اخواننا هؤلاء من الأنصار فقالا لا عليكم أن تقرؤهم اقضوا أمركم فقلت والله لنأتينهم فانطلقنا حتى أتيناهم في سقيفة بني ساعدة فاذا رجل مزمل بين ظهرائهم فقلت من هذا قالوا هذا سعد بن عبادة فقلت ماله قالوا يوعك فلما جلسنا قليلاً تشبه خطيبهم فأثنى على الله بما هو أهله ثم قال أما بعد فنحن أنصار الله وكتيبة الاسلام وأنتم معشر المهاجرين رهط وقد دقت دافئة من قومكم فاذا هم يريدون أن يختزلونا من أصلنا وأن يحصنونا عن الأمر فلما سكت أردت أن أتكلم وكنت زورت مقالة أعجبتني أريد أن أقدمها بين يدي ابي بكر وكنت أداري منه بعض الحد فلما أردت أن أتكلم قال ابو بكر على رسلك فكرهت أن أعصيه فتكلم أبو بكر فكان هو أحلم مني وأوقر والله ما ترك من كلمة أعجبتني فسي تزويري إلا قال في بديته مثلها أو أفضل حتى سكت فقال ما ذكرتكم فيكم من خير فأنتم له أهل ولن يعرف هذا الأمر إلا لهذا الحي من قريش هم أوسط العرب نسبا ودارا وقد رضيت لكم أحد هذين الرجلين فبايعوا أيهما شئتم فأخذ بيدي ويدي ابي عبيدة بن الجراح وهو جالس بيننا فلم أكره مما قال غيرها كان والله أن أقدم فتضرب عنقي لا يقرني ذلك من اثم أحب الي من أن أتأمر على قوم فيهم ابو بكر اللهم إلا أن تسول الى نفسي عند الموت شيئاً لا أجده الآن فقال قائل الأنصار أنا جدي لها المحكك وعذيقها المرجب منا أمير ومنكم أمير يا معشر قريش فكثرت اللغط وارتفعت الأصوات حتى فرقت من الاختلاف فقلت

ابسط يديك يا أبا بكر فبسط يده فبايعته وبايعه المهاجرون ثم  
بايعته الأنصار ونزونا على سعد بن عباد فقال قائل منهم  
قتلت سعد بن عباد فقلت قتل الله سعد بن عباد قال عمر  
وأنا والله ما وجدنا فيما حضرنا من أمر أقوى من مبايعة  
أبي بكر خشينا أن فارقنا القوم ولم تكن بيعة أن يبايعوا رجلا  
منهم بعدنا فأما تابعناهم على ما لا نرضى وأما نخالفهم فيكون فساد  
فمن بايع رجلا على غير مشورة من المسلمين فلا يتابع هو ولا الذي  
بايعه تخفة أن يقتلا

حدثنا أحمد ابن منيع حدثنا اسحاق بن يوسف الأزرق عن داود بن  
أبي هند عن سعيد بن المسيب عن عمر بن الخطاب قال

missing.

1-3

4 رجم رسول الله (ص) ورجم أبو بكر ورجعت

5. ولولا أني أكره أن أزيد في كتاب الله لكتبته في المصحف فأنى قد  
خشيت أن تجيء أقوام فلا يجدونه في كتاب الله فيكفرون به

missing.

6-7

قال وفي الباب عن عليّ قال أبو عيسى حديث عمر حديث حسن  
صحيح وروى من غير وجه عن عمر \*

حدثنا سلمة بن شبيب وإسحاق بن منصور والحسن بن علي الخلال  
وغير واحد قالوا حدثنا عبد الرزاق عن معمر عن الزهري عن  
عبيد الله بن عبد الله بن عتبة عن ابن عباس عن عمر بن  
الخطّاب

a- قال إنّ الله بعث محمداً (ص) بالحق وأنزل عليه الكتاب فكان فيما  
أنزل عليه آية الرجم فرجم رسول الله (ص) ورجعنا بعده

b- وأنّي خائف أن يطول بالناس زمان فيقول قائل لا نجد الرجم في  
كتاب الله فيضلّوا بترك فريضة أنزلها الله

c- ألا وإنّ الرجم حقّ على من زنى إذا أحصن وقامت البيّنة أو كان  
حبل أو اعتراف  
وفي الباب عن عليّ

قال أبو عيسى هذا حديث حسن صحيح وروى من غير وجه عن عمر  
(رض) .

## أمر سقيفة بنى ساعدة

قال ابن اسحاق : ولما قُيِّضَ رسول الله (ص) انحاز هذا الحى من الأنصار الى سعد بن عباد ، فى سقيفة بنى ساعدة ، واعتزل على بن أبى طالب والزبير ابن العوام وطلحة بن عبيد الله فى بيت فاطمة ، وانحاز بقية المهاجرين الى أبى بكر ، وانحاز معهم أسيد بن حضير ، فى بنى عبد الأشهل ، فأتى آت الى أبى بكر وعمر ، فقال : ان هذا الحى من الأنصار مع سعد بن عباد فى سقيفة بنى ساعدة ، قد انحازوا اليه ، فان كان لكم بأمر الناس حاجة ، فأدركوا قبل أن يتفارق أمرهم ، ورسول الله (ص) فى بيته لم يفرغ من أمره ، قد أغلسق دونه الباب أهله . قال عمر : فقلت لأبى بكر انطلق بنا الى اخواننا هؤلاء من الأنصار ، حتى ننظر ما هم عليه .

قال ابن اسحاق : وكان من حديث السقيفة حين اجتمعت بها الانصار ، أن عبد الله بن أبى بكر ، حدثنى عن ابن شهاب الزهري ، عن عبيد الله بن عبد الله بن عتبة بن مسعود ، عن عبد الله بن عباس ، قال : أخبرنى عبد الرحمان بن عوف ، قال : وكنت فى منزله بمنى أنتظره ، وهو عند عمر فى آخر حجة حجها عمر .

قال : فرجع عبد الرحمان بن عوف من عند عمر ، فوجدنى فى منزله بمنى أنتظره ، وكنت أقرئه القرآن ، قال ابن عباس ، فقال لى عبد الرحمان بن عوف : لو رأيت رجلاً أتى أمير المؤمنين ، فقال : يا أمير المؤمنين ، هل لك فى فلان يقول : والله لو قد مات عمر بن الخطاب لقد بايعت فلاناً ، والله ما كانت بيعة أبى بكر الا فلتة فتمت .

قال : فغضب عمر ، فقال : انى ان شاء الله لقائم العشية فى الناس ، فمخذّهم هؤلاء الذين يريدون أن يغصبوهم أمرهم ، قال عبد الرحمان : فقلت : يا أمير المؤمنين لا تفعل ، فان الموسم يجمع رعاى الناس وغوغاءهم ، وانهم هم الذين يغلبون على قريك ، حين تقوم فى الناس ، وانى أخشى أن تقوم فتقول مقالة يطير بها أولئك عنك كل مطير ، ولا يعوها ولا يضعوها على مواضعها ، فأهل حتى تقدم المدينة ، فانها دار السنّة ، وتخلص بأهل الفقه وأشراف الناس ، فتقول ما قلت بالمدينة متمكناً ، فيعى أهل الفقه مقالتك ، ويضعوها على مواضعها ، قال : فقال عمر : أما والله ان شاء الله لأقومنّ بذلك أول مقام أقومه بالمدينة .

قال ابن عباس : فقد منا المدينة فى عقب ذى الحجة ، فلما كان يوم الجمعة عجلت الرّواح حين زالت الشمس ، فأجد سعيد بن زيد بن عمر بن نفيل جالسا الى ركن المنبر ، فجلست حذوه ، تمس ركبتى ركبتيه ، فلم أنشب أن خرج عمر بن الخطاب ، فلما رأيته مقبلاً ، قلت لسعيد بن زيد : ليقولن العشية على هذا المنبر مقالة لم يقلها منذ استخلف ، قال : فأنكر على سعيد بن زيد ذلك ، وقال : ما عسى أن يقول مما لم يقل قبله ، فجلس عمر على المنبر ، فلما سكت المؤذنون ،

قام فأثنى على الله بما هو أهل له ، ثم قال : أما بعد ، فإني قائل لكم اليوم مقالة ، قد قدر لي أن أقولها ، ولا أدري لعلها بين يدي أجلى ، فمن عقلها ووعاها فليأخذ بها حيث انتهت به راحلته ، ومن خشي أن لا يحييها فلا يحل لأحد أن يكذب علي ، إن الله بعث محمدا ، وأنزل عليه الكتاب ، فكان مما أنزل عليه آية الرجم ، فقرأنها وعلمناها ووعيناها ، ورجم رسول الله ( ص ) ، ورجمنا بعده ، فأخشي أن طال بالناس زمان أن يقول قائل : والله ما نجد الرجم في كتاب الله ، فيضللوا بترك فريضة أنزلها الله ، وإن الرجم في كتاب الله حق على من زنى إذا أحصن من الرجال والنساء ، وإذا قامت البينة ، أو كان الحبل أو الاعتراف ، ثم انا قد كنا نقرا فيما نقرأ من كتاب الله : " لا ترغبوا عن آبائكم ، فإنه كفر بكم أن ترغبوا عن آبائكم " .

ألا إن رسول الله ( ص ) قال : " لا تطروني كما أطرى عيسى بن مريم ، وقولوا : عبد الله ورسوله " ، ثم إنه قد بلغني أن فلانا قال : والله لو قد مات عمر بن الخطاب لقد بايعت فلانا ، فلا يخزن امرأ أن يقول : إن بيعة أبي بكر كانت فلتة فتئت ، وإنها قد كانت كذلك ، إلا أن الله قد وقى شرها ، وليس فيكم من تنقطع الأعناق إليه مثل أبي بكر ، فمن بايع رجلا عن غير مشورة من المسلمين ، فإنه لا بيعة له هو ولا الذي بايعه تغرة أن يقتلا ، إنه كان من خبرنا حين توفي الله نبيه ( ص ) أن الأنصار خالفونا ، فاجتمعوا بأشرافهم في سقيفة بنى ساعدة ، وتخلف عنا على بن أبي طالب والزبير بن العوام ومن معهم ، واجتمع المهاجرون إلى أبي بكر ، فقلت لأبي بكر : انطلق بنا إلى اخواننا هؤلاء من الأنصار ، فانطلقنا نؤمهم حتى لقينا منهم رجلا صالحا فذكرنا لنا ما تمألا عليه القوم ، وقالا : أين تريدون يا معشر المهاجرين ؟ قلنا : نريد اخواننا هؤلاء من الأنصار ، قالا : فلا عليكم أن لا

تقربوهم يا معشر المهاجرين ، اقضوا أمركم . قال : قلت : والله لنأتينهم . فانطلقنا حتى أتيناهم في سقيفة بنى ساعدة ، فإذا بين ظهرائهم رجل مزمل فقلت : من هذا ؟ فقالوا : سعد بن عباد ، فقلت : ماله ؟ فقالوا : رجع . فلما جلسنا تشهد خطيبهم ، فأثنى على الله بما هو له أهل ، ثم قال : أما بعد ، فنحن أنصار الله وكتيبة الاسلام ، وأنتم يا معشر المهاجرين رهط منا ، وقد دقت دافئة من قوكم ، قال : وإذا هم يريدون أن يحتازونا من أصلنا ، ويغصبونا الأمر ، فلما سكت أردت أن أتكلم ، وقد زورت في نفسي مقالة قد أعجبتني ، أريد أن أقدمها بين يدي أبي بكر ، وكنت أداري منه بعض الحد ، فقال أبو بكر : على رسلك يا عمر ، فكرهت أن أغضبه ، فتكلم ، وهو كان أعلم مني وأوقر ، فوالله ما ترك من كلمة أعجبتني من تزويري إلا قالها في بديته ، أو مثلها أو أفضل ، حتى سكت ، قال : أما ما ذكرتكم فيكم من خير ، فأنتم له أهل ، ولن تعرف الحرب هذا الأمر إلا لهذا الحى من قريش ، هم أوسط الحرب نسبا ودارا ، وقد رضيت لكم أحد هذين الرجلين ، فبايعوا أيهما شئتم ، وأخذ بيدي وييد

أبي عبيدة بن الجراح ، وهو جالس بيننا ، ولم أكره شيئا مما قاله  
غيرها ، كان والله أن أقدم فتضرب عنقي ، لا يقرّني ذلك إلى اثم ،  
أحب إلى من أن أتأمر على قوم فيهم أبو بكر .  
قال : قال قائل من الأنصار : أنا جدي لها المحك وعذيقها  
المرجّب ، منا أمير ، ومنكم أمير ، يا معشر قريش . فكشر اللّخبط ،  
وارتفعت الأصوات ، حتى تخوّفت الاختلاف ، فقلت : ابسط يدك يا أبا  
بكر ، فبسط يده ، فبايعته ، ثم بايعه المهاجرون ، ثم بايعه  
الأنصار ، ونزونا على سعد بن عباد ، فقال قائل منهم : قتلتم  
سعد بن عباد . قال : فقلت : قتل الله سعد بن عباد .



وحدثنا يحيى بن يحيى التميمي أخبرنا هشيم عن منصور عن الحسن  
عن حطان بن عبد الله الرقاشي عن عبادة بن الصامت

a- قال قال رسول الله (ص) خذوا عني قد جعل الله لهن سبيلا  
البكر بالبكر جلد مائة ونفي سنة والثيب بالثيب جلد مائة  
والرجم.

وحدثنا عمرو الناقد حدثنا هشيم أخبرنا منصور بهذا الاسناد مثله

## Mu.G.II

حدثنا محمد بن المثنى وابن بشار جميعا عن عبد الأعلى قال ابن  
المثنى حدثنا عبد الأعلى حدثنا سعيد عن قتادة عن الحسن عن  
حطان بن عبد الله الرقاشي عن عبادة بن الصامت قال

a.a- كان نبي الله (ص) اذا انزل عليه كرب لذلك وتردد له وجهه  
قال فانزل عليه ذات يوم فلقى كذلك فلما سرى عنه قال

a- خذوا عني فقد جعل الله لهن سبيلا الثيب بالثيب والبكر بالبكر  
جلد مائة ثم رجم بالحجارة والبكر جلد مائة ثم نفي سنة

cf.) وحدثنا محمد بن المثنى وابن بشار قالا حدثنا محمد بن جعفر حدثنا  
شعبة ح وحدثنا محمد بن بشار حدثنا معاذ بن هشام حدثني ابي كلاهما  
عن قتادة بهذا الاسناد غير ان في حديثهما البكر يجلد ونفي سنة  
يجلد ويرجم لا يذكران سنة ولا مائة (

حدثنا قتيبة حدثنا هشيم عن منصور بن زاذان عن الحسن عن حطان  
بن عبد الله عن عبادة بن الصامت قال

a- قال رسول الله (ص) خذوا عني فقد جعل الله لهن سبيلا الشيب  
بالشيب جلد مائة ثم الرجم والبكر بالبكر جلد مائة ونفي سنة

قال أبو عيسى هذا حديث حسن صحيح والعمل على هذا عند بعض  
أهل العلم من أصحاب النبي (ص) منهم علي بن أبي طالب وأبي بن  
كعب وعبد الله بن مسعود وغيرهم قالوا الشيب تجلد وترجم وإلى هذا  
ذهب بعض أهل العلم وهو قول اسحاق وقال بعض أهل العلم من  
أصحاب النبي (ص) منهم أبو بكر وعمر وغيرهما الشيب إنما عليه  
الرجم ولا يجلد وقد روى عن النبي (ص) مثل هذا في غير حديث  
في قصة ماعز وغيره أنه أمر بالرجم ولم يأمر أن يجلد قبل أن  
يرجم والعمل على هذا عند بعض أهل العلم وهو قول سفيان الثوري  
وابن المبارك والشافعي وأحمد .

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